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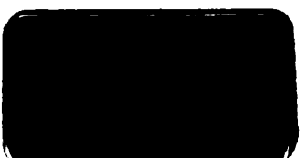

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HANDBOOK

ON THE

LAW OF JUDICIAL PRECEDENTS

OR THE

SCIENCE OF CASE LAW

By HENRY CAMPBELL BLACK, M. A.

Author of Black's Law Dictionary, and of Treatises on Judgments, Constitutional Law, Statutory Construction, Tax Titles, Intoxicating Liquors, Bankruptcy, etc.

"Freedom slowly broadens down
From precedent to precedent"

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PREFACE

NEARLY a quarter of a century ago, the late Mr. Justice Miller, of the Supreme Court of the United States, in a public address on the use and value of authorities in the argument and decision of cases, expressed his surprise that no book had yet been written, or none that he had seen, distinctively devoted to the subject on which he was speaking, adding, perhaps by way of explanation of the fact, that "the sources of such a work are not ample and are difficult to come at." If a systematic and comprehensive treatise on the law of judicial precedents was a desideratum at that time, it is much more so to-day. For the reported decisions have enormously multiplied, and the lawyer's problem now is not merely to find the law, but to weigh and estimate the value of what he discovers. Now, more than ever, he needs a guide through "the lawless science of the law, the countless myriad of precedents." Moreover the rules which govern the subject,—if rules they can be called, which rest only in judicial discretion and have no stronger sanction than judicial habit,—are intricate and not free from confusion, and have long been in need of clear and discriminating exposition. Also it is true that the very theory of the precedent has been vigorously assailed of late in high quarters, and there are evidences of an insistent demand for greater flexibility in the interpretation of the law and a closer correspondence between the rulings of the courts and what is supposed to be the spirit of the age or the wants and wishes of the people.

Yet conditions remain substantially as they were when Mr. Justice Miller spoke. Some portion of the general subject, but by no means the whole, was covered in the treatise of Ram on "Legal Judgment," an English work which exhibited the industrious labor of a pioneer in this field; but

the American edition of that book, which added a small number of American cases and an insufficient discussion of the theories and principles peculiar to the American system of courts, is already more than forty years old. More useful work on the American side was done by Mr. J. C. Wells, in his book on "Res Adjudicata and Stare Decisis," but his treatise was published in 1878, and that portion of it which was devoted to the law of precedents was hardly intended, even then, to be more than a sketch of the subject. Professor Wambaugh's excellent and deservedly popular little treatise on the "Study of Cases" is admirably adapted for use in the class-room, as an outline of the subject for students at law, but makes no pretension to an exhaustive citation of the authorities nor to an extended discussion of the subject in detail. A few articles in the legal magazines are to be found, some of them highly instructive, but they are necessarily specialized and limited in scope. Judge Dillon, in his scholarly commentary on the "Laws and Jurisprudence of England and America," has adverted to some few aspects of the subject, and, as always, has illuminated whatever he has touched. Finally, the general theory of the precedent, in respect to its origin and its employment, has received some notice from such writers on the philosophy of jurisprudence as Austin, Markby, Holland, Pollock, Maine, and Salmond. But still no one has hitherto attempted what the author of these pages has set before him as his task, namely, to write a real and complete treatise on the subject of judicial precedents or the science of case-law, at once theoretical and practical, and therefore adapted not only for the instruction of the student in what is perhaps the most important part of his legal education,—the judging, testing, and employment of the weapons with which he is to fight his forensic battles,—but also of substantial value to the practitioner in the preparation of briefs and the argument of causes, furnishing him with a full discussion of the rules which the courts themselves have prescribed for their governance in these matters and an abundant citation of authorities to support his criticisms and contentions.

Agreeably to this plan and purpose, the work has been made to include an extended consideration of the nature and authority of judicial precedents; their place in comparative jurisprudence and in equity; the rules which govern the interpretation of judicial decisions and opinions; the processes of analogical argument and of combining cases; the various and complicated considerations which may affect the force and value of a non-obligatory precedent; the nature of dicta and the method of their detection and the reasons for their want of authority; the general doctrine of stare decisis, with its special applications to cases of constitutional and statutory construction, to those judgments which have become "rules of property" and to "the law of the case"; the authority of precedents as between various courts of the same state and as between the several courts of the federal system; the use of precedents from other states and foreign countries, with the various causes which may affect their rank in the scale of authority, the reasons for approving them or for criticising them, and the underlying principles which induce the courts to follow "the better reason" or the "general current of authority"; the effect of the decisions of the United States courts as authorities in the courts of the states; the great and difficult subject of the cases in which the federal courts are constrained to accept and follow the decisions of the state courts and those in which they hold themselves free to form an independent judgment; and finally, the effect of the reversal or overruling of previous judicial decisions. Also, as among the fundamentals of the subject, it has been necessary to consider (in the first chapter) the rules for the solution of novel questions or cases of first impression, and the proper attitude of the courts in the face of precedents which are challenged as obsolete or as locally inapplicable.

I may venture to dissent from Mr. Justice Miller's statement that "the sources of such a work are not ample," while I most heartily concur in his opinion that they are "difficult to come at." It is true that some of the chief rules of the subject have been specifically laid down by the courts, and that such particular decisions are accessible to any one who

understands how to look for and to find the authorities on any given topic. Naturally I have not failed to search out these cases, which may be called "direct" adjudications upon the doctrine of stare decisis or some other branch of the general subject, and I believe I have succeeded in discovering and citing practically all that are of real value or importance. But besides this, it is not too much to say that nearly every reported decision of any of the higher courts in this country and in England contains, either by way of comment or illustration, something instructive or suggestive on some branch or aspect of the law of judicial precedents. These comments and illustrations do not constitute the main subject of the court's opinion, and therefore (properly enough) they seldom if ever find their way into the syllabi and the digests. They are to be "come at" only by a patient thumbing of the reports, page by page, and the careful reading of many opinions. To perform this labor upon all the reported decisions would surpass the limits of human endeavor, since it would involve the examination of more than a million opinions. But without this, it is possible, by diligence and a sufficiently varied research, to gather together a number of examples great enough to serve all the purposes of a practical exposition of the subject, and to supply the reader with pertinent and useful citations. This I have endeavored to accomplish; and whatever may be the measure of success attained, at least I have not spared to bestow upon the task the hard and painstaking labor and close thought which its interesting character and difficult problems demand.

H. C. B.

WASHINGTON, D. C., December 1, 1911.

TABLE OF CONTENTS

CHAPTER I

NATURE AND AUTHORITY OF JUDICIAL PRECEDENTS

Section		Page
1.	Nature of Precedents	2–13
2–4.	Comparative Jurisprudence of Doctrine of Precedents	14–30
5.	Precedents in Equity Jurisprudence	30–36
6–10.	Scope and Limitations of a Precedent	37–49
11.	Interpretation of Judicial Decisions	49–53
12–14.	Opinions and Syllabi	53–60
15.	Identity or Parallelism of Facts; Distinguishing Cases	60–63
16–18.	Arguing from Analogy; Combining Cases	63–72
19–20.	Legislative and Executive Constructions and Decisions of Special Tribunals and Quasi-Judicial Bodies	72–76
21–22.	Decision by Equally Divided Court	76–80
23.	Considerations Affecting the Force of Precedents	80–81
24–25.	Nature of Question Decided and Form of Proceeding	82–85
26.	Hypothetical, Friendly, and Test Cases	85–88
27.	Advisory Opinions	88–90
28–30.	New and Isolated Decisions	90–94
31–32.	Leading Cases; Ancient Cases	95–97
33.	Cases Involving Special or Peculiar Facts	98–99
34–35.	Cases Doubted, Criticised, or Overruled	99–104
36.	Cases Approved or Acquiesced in	105–107
37.	Argument by Counsel and Consideration by Court	107–112
38–40.	Rank and Reputation of Court or Judge	112–121
41–42.	Opinion of the Court	122–130
43.	Unanimity and Dissent; Absence of Judges; Concurrence in Result	131–137
44.	Effect of Pending Appeal or Rehearing	137–138
45–47.	Reports of Cases	138–145
48–49.	Precedents Obsolete or Locally Inapplicable	146–152
50–53.	Absence of Precedent; Decision on Principle	152–165

CHAPTER II

DICTA

Section		Page
54.	Nature of Dicta	166–171
55.	Argument and Consideration as Affecting Nature of Decision	171–174
56.	Decision Rested on Other Grounds	174–176
57.	Dicta Not Binding as Precedents	176–180
58.	Rulings in Anticipation of New Trial	180–181

CHAPTER III

DOCTRINE OF STARE DECISIS

59.	General Principle	182–189
60.	Change in Composition or Organization of Court	189–191
61.	Stare Decisis Distinguished from Res Judicata	191–194
62.	Decisions on Matters of Practice	194–195
63.	Former Decision on Same Facts or Transaction	195–198
64.	Decisions on Questions of Fact or Evidence	198–199
65.	Limitations of Rule; Decision Manifestly Erroneous	199–202
66–68.	Reasons For and Against Overruling Former Decision	203–218
69.	Extremes to be Avoided	218–220
70.	Conflicting Decisions	220–221

CHAPTER IV

CONSTITUTIONAL AND STATUTORY CONSTRUCTION

71.	General Principle	222
72.	Construction and Interpretation of Constitutions	222–226
73.	Decisions on Constitutionality of Statutes	226–230
74.	Construction and Interpretation of Statutes	231–235
75.	Re-enacted Statutes	235–236

CHAPTER V

RULES OF PROPERTY

76.	Definition	237–247
77.	Requisites of Decision Constituting Rule of Property and Scope of Rule	247–250
78.	Actual or Presumptive Reliance on Rule	251–255

Section Page
79. Judicial Adherence to Rules of Property..... 255–259
80. When Rules of Property may be Reversed..... 259–261

CHAPTER VI

THE LAW OF THE CASE

81. General Principle..... 262–265
82. Further Proceedings in Appellate Court..... 266–271
83. Subsequent Proceedings in Trial Court..... 271–274
84. Proceedings Before Different Judge..... 274–277
85. Character and Essentials of Decision..... 277–279
86. Rulings on Motions and Demurrers..... 280–282
87. What Points or Matters Concluded..... 283–286
88. New Facts or New Parties..... 286–289
89. Removal of Cause to Federal Court..... 289–293

CHAPTER VII

AUTHORITY OF PRECEDENTS AS BETWEEN VARIOUS COURTS OF THE SAME STATE

90. Supreme Court and Inferior Courts..... 294–298
91. Supreme Court and Intermediate Appellate Courts 299–303
92. Intermediate and Inferior Courts..... 303–304
93. Chancery Courts..... 305
94. Courts of Co-Ordinate Jurisdiction..... 306–308
95. General and Special Terms..... 308–310

CHAPTER VIII

AUTHORITY OF PRECEDENTS AS BETWEEN THE VARIOUS COURTS OF THE UNITED STATES

96. Decisions of Supreme Court..... 311–315
97. Decisions of Inferior Courts as Precedents in Supreme Court..... 316–317
98. Construction of State Statutes..... 318–319
99. Comity Between Co-Ordinate Courts..... 319–323
100. Special Rule in Patent Cases..... 323–328
101. Special Rule as to Tariff Cases..... 328–329
102. Circuit Court of Appeals and Inferior Courts of Same Circuit..... 329–332
103. Circuit Court of Appeals and Inferior Courts in Other Circuits..... 333
104. As Between Different Judges in Same Court..... 334–335

CHAPTER IX

DECISIONS OF FEDERAL COURTS AS AUTHORITIES IN STATE COURTS

Section		Page
105.	Federal Questions in General	336–346
106.	Validity and Construction of Acts of Congress	347–352
107.	Jurisdiction and Powers of Federal Courts	352–353
108.	Interpretation and Application of Federal Decisions	354–359
109.	Questions of General Jurisprudence or Local Law	359–363
110–111.	Validity and Construction of State Statutes	364–368
112.	Commercial Law	368–372
113.	Decisions of Inferior Federal Courts	372–374
114.	Rule for Inferior State Courts	374–377
115.	Rule for Territorial Courts	377–379

CHAPTER X

DECISIONS OF COURTS OF OTHER STATES

116–117.	Construction and Application of Laws of Another State	380–386
118.	Constitutionality of Laws of Another State	386–387
119.	Construction of Statute Adopted from Another State	388–396
120.	Questions Governed by Local Law of Another State	396–399
121.	Obiter Dictum	400
122.	Questions of General Law; Persuasive Authority of Decisions from Another State	400–410
123.	Decisions of Inferior Courts	410–413
124.	Conforming Decisions to General Current of Authority	413–416
125.	Conflicting Decisions of Other States	416–427

CHAPTER XI

DECISIONS OF COURTS OF FOREIGN COUNTRIES

126.	English Decisions on the Common Law	428–433
127.	Adopted British Statutes	433–436
128.	English Equity Cases	436–438
129.	English Ecclesiastical Cases	439–440

Section Page
130. Value of English Precedents in Novel and Unsettled Cases ... 440–443
131. English Decisions Locally Inapplicable ... 443–447
132. Decisions of Other Foreign Countries ... 447–451

CHAPTER XII

FEDERAL COURTS FOLLOWING DECISIONS OF STATE COURTS; IN GENERAL

133. The General Rule ... 452–457
134. Varying Decisions in Different States ... 458–459
135. What Decisions Controlling ... 460–467
136. Same; Fictitious or Test Cases ... 467–469
137. Same; Rulings of Intermediate and Inferior Courts ... 469–471
138–139. Absence of Decisions by State Court; Federal Court Rendering First Decision ... 471–474
140–142. Prior Federal Decision and Subsequent Contrary State Decision ... 474–478
143. Inconsistent or Fluctuating Decisions ... 478–484
144–145. Same; Vested Rights and Contracts ... 484–488
146. Same; Validity of Municipal Bonds ... 488–492
147–148. Conflicting State and Federal Decisions; Duty of Inferior Federal Courts ... 492–495

CHAPTER XIII

SAME; MATTERS OF LOCAL LAW AND RULES OF PROPERTY

149. General Rule ... 496–498
150. Questions of Public Policy ... 499–501
151. Rules of Property in General ... 502–504
152. Law of Real Property ... 504–513
153. Mortgages, Foreclosure, and Redemption ... 513–518
154. Acknowledgment and Record of Deeds ... 518
155. Adverse Possession and Color of Title ... 519–520
156–157. Wills and Descent and Distribution of Property 521–523
158. Nature and Effect of Contracts ... 524–525
159–160. Transfer and Incumbrance of Chattels ... 525–528
161. Liens ... 528–529
162. Law of Corporations ... 530–532
163. Rights and Liabilities of Municipal Corporations 532–535
164. Domestic Relations ... 535–536
165. Interest and Usury ... 536–537

CHAPTER XIV

SAME; VALIDITY AND CONSTRUCTION OF STATE CONSTITUTIONS AND STATUTES

Section		Page
166.	General Rule	538–543
167.	Requisites of Decision to be Followed	543–549
168–170.	Federal Questions Excluded	549–552
171.	Construction of State Constitution	552–554
172.	Enactment and Repeal of Statutes	554–556
173.	Constitutionality of Statutes	556–560
174.	Statutory Construction in General	560–583
175.	Statute of Limitations	583–586
176.	Exemption Laws	586–587
177.	Revenue and Tax Laws	587–592
178.	Employer's Liability Laws	592–593

CHAPTER XV

SAME; FEDERAL QUESTIONS

179.	General Rule	594–597
180.	Construction of Acts of Congress	597–600
181.	Federal Corporations	600–601
182.	Jurisdiction and Powers of Federal Courts	601–604
183.	Criminal Law	604–605
184–186.	Obligation of Contracts	605–609
187.	Due Process of Law	609–610

CHAPTER XVI

SAME; COMMERCIAL LAW AND GENERAL JURISPRUDENCE

188.	General Rule	611–626
189.	Commercial Law	626–631
190.	General or Common Law	631–635
191.	Validity and Construction of Contracts	635–638
192.	Liability for Negligence or Other Torts	639–645
193–194.	Law of Master and Servant	645–649
195.	Public Policy	650–651
196.	International Law	651–653
197.	Conflict of Laws	653–654

CHAPTER XVII

SAME; EQUITY AND ADMIRALTY

Section		Page
198.	Equity Jurisprudence in General	655–658
199–200.	Equity Jurisdiction under State Statutes	659–663
201.	Admiralty and Maritime Law	663–664

CHAPTER XVIII

SAME; PROCEDURE AND EVIDENCE

202.	Conformity Act and Its Effect	665–669
203.	Rules of Pleading	669–671
204.	Process and Jurisdiction	671–673
205–206.	Right of Action and Prerequisites to Suit	674–676
207.	Judicial Authority and Discretion	676–677
208.	Criminal Cases	678–679
209.	Rules of Evidence in General	679–682
210.	Competency of Witnesses	682–686
211.	Evidence in Criminal Cases	686–688

CHAPTER XIX

EFFECT OF REVERSAL OR OVERRULING OF PREVIOUS DECISION

212.	Retrospective Effect in General	689–691
213.	The Law of the Case	691–692
214.	Saving of Vested Rights and Contracts	693–695
215.	Same; Showing Individual Rights and Injury	695–697
216.	Same; Taxation and Exemption	698–700
217.	Effect on Existing Judgments	700–701

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HANDBOOK

ON THE

LAW OF JUDICIAL PRECEDENTS

CHAPTER I

NATURE AND AUTHORITY OF JUDICIAL PRECEDENTS

1. Nature of Precedents.
2–4. Comparative Jurisprudence of Doctrine of Precedents.
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43. Unanimity and Dissent; Absence of Judges; Concurrence in Result.
44. Effect of Pending Appeal or Rehearing.
45–47. Reports of Cases.
48–49. Precedents Obsolete or Locally Inapplicable.
50–53. Absence of Precedent; Decision on Principle.

NATURE OF PRECEDENTS

1. A judicial precedent is an adjudged case or decision of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case afterwards arising, between the same or other parties, in the same or another court, or a similar question of law.

Meaning of the Term

In politics and the science of government, in parliamentary usage, and in some other connections, a precedent is a pattern or example, drawn from former history, and considered as justifying action presently proposed to be taken. Its office is to answer the objection that the proposed action is an innovation. Its function primarily is not to dictate or govern present action, but only to justify it, on the theory that what was formerly done or allowed, without successful objection, may permissibly be repeated. In this sense, there may also be negative precedents. That is to say, the fact that no such action has ever been taken in the past, though occasions or opportunities for it may often have arisen, is an argument against the propriety of its being now taken. But in neither instance is a precedent, in the political sense, possessed of any constraining force originally, although, from frequent repetition or long observance, it may come to acquire something of the fixity of a rule, so that its violation would be generally regarded as highly improper, as contrary to good order or public policy, or even, in cases involving political rights and arising under an unwritten constitution, as revolutionary. In pleading and conveyancing, a precedent is a model which has been judicially approved, or approved by long use without criticism, or which has successfully withstood the test of formal objection in the courts. But in the science of case-law, the primary idea of a precedent is that of a rule judicially established and presumptively binding. It is not to be considered in the light of a model which may safely be followed, nor as an example which will justify subsequent ju-

dicial action in the same direction. It declares or enunciates the rule or principle of law which must (not may) be followed in the decision of similar causes in the future, by the same court and by those courts which are under its revisory jurisdiction, or which can be disregarded only in exceptional cases and for the very strongest reasons. It is quite true that two courts which are absolutely independent of each other,—as, the supreme courts of two different states,—may decide the same question of law in precisely the same manner, and that the one court may point out and rely on the previous decision of the other court as the substantial or only reason for its own decision. And in this way, the previous judgment of one court may furnish an "example" rather than a "rule" for the subsequent judgment of another court. This distinction is noted in the definition given at the head of this section. But in such instances, the previous decision can be described as a precedent only by using the term in a broad and unscientific sense, not when it is employed with strict accuracy. For, in the case supposed, the determination of a foreign court may possess greater or less persuasive influence as an argument, but nothing more; whereas the doctrine of precedents, properly and strictly so called, is embodied in the maxim "stare decisis," and only those "decisa" are to be regarded as precedents which are of obligatory force. In the common affairs of life, precedent may derive its value from experience; but in law, its force is based on authority. A judicial decision is a precedent because it is an authoritative exposition of the law by a tribunal constituted for that purpose, and whose judgments are legally binding, not only upon the parties immediately before it, but also (within territorial or political limits) upon other courts and upon the community generally.

Basis of Doctrine of Precedents

The authoritative force of judicial precedents rests partly on the legal presumption that what has previously been decided by a court of competent jurisdiction was correctly decided and therefore should not be reconsidered, and partly on the conception of a judicial decision as law. In the

latter view, a solemn adjudication of a court having authority withdraws from the realm of abstraction the rule or principle of law which it enunciates and establishes it in the character of a fixed and permanent standard, thus placing it beyond the reach, for abrogation or modification, of inferior courts and even of the successors of the judge or the court which enunciated it. Thus it is said: "The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority." [1] So also, according to Blackstone, "it is an established rule to abide by former precedents where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." [2]

In regard to the presumption of correctness attaching to a judicial decision, it may be remarked that it may vary in degree, ranging from a practically conclusive and irresistible force to an almost negligible quantity. This depends on various considerations affecting the value and importance of different precedents, which we shall have occasion to notice hereafter. Generally speaking, however, it is a presumption of law, which, if not irrebuttable, requires extremely powerful considerations to overthrow it. Thus, it is observed by an eminent writer: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and con-

[1] Bates v. Relyea, 23 Wend. (N. Y.) 336, 340. [2] 1 Bl. Comm. 69.

tracts by it."[3] And by another: "All judgments are supposed to apply the existing law to the facts of the case, and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened."[4]

Technically, the doctrine of precedents does not rest upon the principle of res judicata. For the latter is properly a branch of the law of estoppel, and has relation to questions of fact rather than of law. It operates also upon the parties, rather than the court, and precludes them from again bringing into controversy facts once litigated and determined by the solemn judgment of a court. Yet in a broader sense the principle of adherence to judicial precedents may be brought within the operation of the maxim, "res judicata pro veritate accipitur." For this is no arbitrary rule, but one which rests upon solid grounds of public policy and convenience, and the same considerations are equally applicable to the adjudications of the courts whether they are considered as enunciating rules of law or settling disputed facts. In this light, the maxim is simply generalized, or taken out of its narrow application to the circumstances of a particular case and made to include their legal consequences, and extended in its operation from the immediate parties and those in privity with them to all other suitors similarly situated. In just the same way, that fundamental principle which ascribes to the record of a court of competent jurisdiction the sanctity of irrefragable truth may be extended, by analogical reasoning, from its restricted application to recitals of fact in the record, so as to include the pronouncement of the court upon the legal consequences of the facts before it, in other words, its judgment as to the principle of law which governs the rights of the parties. These ideas have been very well expressed by a recent writer on theoretical jurisprudence, in the following terms: "The operation of precedents is based on the legal presumption of the correctness of judicial decisions. It is

[3] 1 Kent, Comm. 475. [4] Cooley, Const. Lim. 49.

an application of the maxim, 'res judicata pro veritate accipitur.' A matter once formally decided is decided once for all. The courts will listen to no allegation that they have been mistaken, nor will they reopen a matter once litigated and determined. That which has been delivered in judgment must be taken for established truth. For in all probability it is true in fact, and even if not, it is expedient that it should be held as true none the less. Expedit reipublicæ ut sit finis litium. When, therefore, a question has once been judicially considered and answered, it must be answered in the same way in all subsequent cases in which the same question again arises. Only through this rule can that consistency of judicial decisions be obtained which is essential to the proper administration of justice. Hence the effect of judicial decisions in excluding the arbitrium judicis for the future, in providing predetermined answers for the questions calling for consideration in future cases, and therefore in establishing new principles of law." [5]

Judicial Decisions as Law or Evidence of Law

The courts have always been sedulous to disclaim any legislative authority. Their function, they declare, is not to make the law, but to expound and apply it. Hence the repeated assertion from the bench that judicial decisions are not law, but only evidence of the law. It has been very recently said that "the decisions of courts of last resort, while generally regarded as of binding authority by lower tribunals, beyond the limits of the case in which the decision is rendered, strictly speaking, are not law. They are simply evidence of law, of greater or less persuasive force, as these decisions are harmonious, apparently well considered, and of long standing." [6] Historically, however, it would not be difficult to prove that a great proportion of what is now commonly received and obeyed as law never had any other origin than in the decisions of the courts.

[5] Salmond, Jurisprudence (2d Ed.) p. 171.

[6] Herron v. Whiteley Malleable Castings Co. (Ind. App.) 92 N. E. 555. And see In re Leonard, 12 Or. 93, 6 Pac. 426, 53 Am. Rep. 323, where it was observed that courts "are compelled to follow precedents, as they are evidence of what is law."

The idea that, in the early stages of the English common law, the judges did not 'manufacture rules and principles out of their sense of justice, propriety, and convenience, but merely discovered and applied ancient general customs of the people, has long since come to be regarded as no more than a discreet judicial fiction. And it would be folly to close the eyes to the patent fact that, even in contemporary times, the body of law is constantly being augmented by judicial decisions which, at first no more than a settlement of the particular case, are followed as precedents, acquire the sanctity of "rules of property," and finally become as truly "law," for all practical intents and purposes, as acts of the legislature. The truth is that the so-called unwritten law stands side by side with statutory law. This is frankly recognized in the codes of some of the states, as, where it is declared that "unwritten law is the law not promulgated and recorded, but which is nevertheless observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men." [7] And even a statute seldom fills the whole measure of the legislator's intention or fits the whole variety of its intended applications until it has been interpreted and construed by the courts; and the authoritative result of their labors is expressed in the ancient and respected maxim, "legis interpretatio legis vim obtinet." [8] And if the test of law be that it is a command which the courts must take as they find it and apply it to the circumstances of actual litigation, it is at least a remarkable phenomenon that, under the doctrine of stare decisis, a court may create a precedent which it not only may, but absolutely must, follow in the future, that is, which it must thereafter take as it finds it and apply it to all similar cases subsequently arising. It is in this sense that we are to understand a declaration of the Supreme Court of Pennsylvania that its own decisions, when free from absurdity, not mischievous in prac-

[7] Code Civ. Proc. Cal. § 1899; B. & C. Comp. Or. § 736.

[8] Ellesmere, Postnati, 55; Breedlove v. Turner, 9 Mart. O. S. (La.) 353.

tice, and consistent with one another, are "the law of the land," which the court itself is bound to execute, rather than any supposed "higher law" manufactured for each special occasion out of the private feelings or opinions of the judges.[9] In fine, as well observed by Professor Pollock: "For all practical purposes, it may be said that a rule of general law which has been laid down or approved, to substantially the same effect, in the House of Lords and in the Supreme Court of the United States, is the law of the English-speaking world, wherever it has not been excluded or varied by express legislation."[10] Theoretically, it is true, the courts have no legislative authority, but actually they do make law. And case-law is as much law as statute law, so far as regards its practical effect on the rights, liberties, and dealings of the people. It is true that a general statute is addressed to all persons within the jurisdiction of the law-making power, while a judicial decision primarily concerns only the parties before the court. But whereas the citizen must, at his peril, conform his conduct and his dealings to the statute law, he will no less, if wisely advised, shape his acts and business transactions with deference to the law announced by the courts. It is true also that case-law differs from the enactments of the legislative department in that it can be annulled or reversed by the courts themselves, and also it may be done away with by a statute. Indeed, any one who needs to be convinced of the effect of the decisions of the courts as pronouncements of the law, will do well to recall the numerous instances in which a rule announced from the bench, and unsatisfactory to the legislators or their constituents, has had to be counteracted by the enactment of a new statute. In effect, the translation of a doctrine or principle into the domain of positive law may be effected directly by the legislature or indirectly by the courts, the difference being rather one of process than of authority. Thus Austin remarks: "There is a distinction between laws, depending not on their sources, but on the modes in which they originate, and

[9] McDowell v. Oyer, 21 Pa. 417.
[10] Pollock, First Book of Jurisprudence, p. 338.

which is very important. This is the distinction between law made obliquely in the way of judicial decision, and that made directly in the way of legislation. When a law or rule is established directly, the proper purpose of its immediate author or authors is the establishment of a law or rule. When the law or rule is introduced obliquely, the proper purpose of its immediate author or authors is the decision of a specific case or of a specific point or question. Generally the new rule, disguised under the garb of an old one, is applied as law to decide the specific case, and, that case passing into a precedent, the same rule is applied to subsequent cases." [11]

Classification of Precedents

Judicial precedents have been variously classified by theoretical writers, and the distinctions drawn are not without their interest and value, though their practical importance may not be great. Thus, they have been described as either "declaratory" or "original," the former being such as merely affirm or reiterate a rule of law already recognized, while the latter introduce into the body of jurisprudence a new rule or principle. Original precedents are of course only made in cases of first impression, and it is to be observed that they seldom, if ever, profess to be anything more than declaratory. That is, they do not speak with the voice of a statute, but announce the discovery of an existing rule of law which can be made to fit the case in hand or extended to it by analogy. Again, precedents have been divided into those which are "imperative" and those which are "persuasive." But a prior judicial decision which is entitled to no more than a persuasive influence upon the mind of the court in another case is not strictly to be described as a precedent at all, as we have stated above, being rather in the nature of an argument or an example. And further, the distinction is not inherent in the nature of the precedent, but only describes the measure of its authority. For a decision of the court of last resort in any state is an "imperative" precedent when cited in the lower

[11] 2 Austin, Jurisprudence (Campbell's Ed.) § 767.

courts of that state, but "persuasive" only when urged in argument before a court of another state.

Not as a classification, but as exhibiting the chief aspects or applications of the doctrine of precedents, the subject might be broadly divided into five branches, in each of which there is to be noted one general rule or governing principle, as follows:

First. Inferior courts are absolutely bound to follow the decisions of the courts having appellate or revisory jurisdiction over them. In this aspect, precedents set by the higher courts are imperative in the strictest sense. They are conclusive on the lower courts, and leave to the latter no scope for independent judgment or discretion.

Second. The judgments of the highest court in any judicial system—state or national—are binding on all other courts when they deal with matters committed to the peculiar or exclusive jurisdiction of the court making the precedent. Thus, when the Supreme Court of the United States renders a decision construing the federal constitution or an act of Congress, that decision must be accepted by all state courts, as well as the inferior federal courts, as not merely persuasive, but of absolutely conclusive authority. In the same way, when the supreme court of a state pronounces judgment upon the interpretation of a statute of the state, its decision has imperative force in the courts of the United States, as well as in the courts of another state.

Third. It is the duty of a court of last resort to abide by its own former decisions, and not to depart from or vary them unless entirely satisfied, in the first place, that they were wrongly decided, and, in the second place, that less mischief will result from their overthrow than from their perpetuation. This is the proper application of the maxim, "stare decisis."

Fourth. When a case is presented to any court for which there is no precedent, either in its own former decisions or in the decisions of any court whose rulings, in the particular matter, it is bound to follow, it may consult and be guided by the applicable decisions of any other court, do-

mestic or foreign. In this case, such decisions possess no constraining force, but should be accorded such a measure of weight and influence as they may be intrinsically entitled to receive, the duty of the court being to conform its decision to what is called the "general current of authority" or the "preponderance of authority," if such a standard can be ascertained to exist with reference to the particular question involved.

Fifth. On the principle of judicial comity, a court which is entirely free to exercise its independent judgment upon the matter at issue, and under no legal obligation to follow the decision of another court on the same question, will nevertheless accept and conform to that decision, as a correct statement of the law, when such a course is necessary to secure the harmonious and consistent administration of the law or to avoid unseemly conflicts of judicial authority. But comity does not require any court to do violence to its own settled convictions as to what the law is.

Comity Defined

The principle of judicial comity, above adverted to, has been very clearly explained by the Supreme Court of the United States, in the following terms: "Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinions of others, since it has a substantial value in securing uniformity of decision and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there

may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided and which arose under the same facts." [12]

Value and Importance of Precedents

One of the best explanations of the value and importance of precedents to be found in the books is given by Chancellor Kent in the following terms: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject; and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." [13] In the same line of thought,

[12] Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

[13] 1 Kent, Comm. 475.

Judge Cooley observes: "All judgments are supposed to apply the existing law to the facts of the case, and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured on. That state of things when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil, and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts and brought within the same reasons, is obviously preferable. Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind." [14] So also the Supreme Court of New York declares: "The decisions of this court, while unreversed, always form the absolute law of the case, and enter with very decisive effect into the body of precedents. They must, from the nature of our legal system, be the same to the science of law as a convincing series of experiments is to any other branch of inductive philosophy. They are, on being promulgated, immediately relied on according to their character, either as confirming an old or forming a new principle of action, which, perhaps, is at once applied to thousands of cases. These are continually multiplying throughout the whole extent of our jurisdiction. Numerous and valuable rights, offensive and defensive, may be claimed under them." [15]

[14] Cooley, Const. Lim. 49. [15] Bates v. Relyea, 23 Wend. 336.

COMPARATIVE JURISPRUDENCE OF DOCTRINE OF PRECEDENTS

2. The principle of adhering to judicial precedents, either as law in themselves or as authoritative evidence of the law, had slight recognition in the jurisprudence of Rome, and was finally abolished by order of the Emperor Justinian.

3. In the modern civil law, as administered in most of the countries of continental Europe, this principle is not recognized as having any obligatory force whatever, although, as a matter of custom, it is more or less observed in actual practice.

4. In England, the principle was very early and firmly established, and has always been regarded as a fixed and fundamental principle of jurisprudence, both in that country and in the United States.

In the Roman Law

It is not easy for an English or American lawyer to conceive of the administration of justice under a system which permits each court to disregard entirely its own previous decisions and those of other courts, in similar cases, and intends that each cause shall be decided according to the judge's own individual ideas of the meaning and applicability of the particular written rule which is supposed to govern it. More especially is this the case since, historically, in the early stages of society, the idea of judicial decisions as sources of law, precedes the conception of anything like a statute or universal rule officially promulgated.[16] Yet it

[16] "The truth is, as Sir Henry Maine has shown, that the idea of law itself is posterior in date to that of judicial decision; and it was the actual observation of a succession of similar decisions of the same kind which gave rise to the idea of a rule or standard to which a case might be referred. As soon as this observation was made, every one would naturally recognize the advantage of stating in an abstract form the rule which might be inferred from a series of uniform decisions, and which, it might be reckoned with tolerable

is the fact that in the jurisprudence of the Roman republic, and almost as much so under the empire, the notion of ascribing to the prior decisions of the courts the force of law in themselves, or even the authority of official expositions of the law, had scant recognition. Naturally some respect was paid to judicial deliverances, beyond the scope of the case immediately in hand. Thus Cicero enumerates "res judicatæ" as among the sources of the law, and one of the emperors allowed the judges, in doubtful or ambiguous cases, to recognize as having the force of law either "custom" or "the authority of matters (cases) which have always been decided in the same way." [17] But it may be observed, from the language employed, that sanction was thus given, not to prior decisions as conclusive evidence of the law, but only as evidence of a more or less ancient judicial custom in like cases, just as sanction was also given to popular or commercial custom. Moreover, this rescript of Severus was repealed by Justinian.

In another way, but also indirectly, judicial custom came to acquire the force of law, during the earlier and freer days of the Roman state. This was by means of the edict annually published by the prætor on assuming office, in which he announced the system of rules which he would apply to the determination of causes coming before him during his term of office, and which was called the "perpetual edict," because intended to be permanently in force, as distinguished from special rules made for special occasions. After the prætorian jurisprudence had assumed a certain scope and fixity, the edict remained substantially the same

certainty, would be applied whenever a similar dispute should arise. This was the first germ of law, and the first recognized laws were probably collections of the scattered rules which had thus come to be adopted." Markby, Elements of Law, p. 60, citing Maine, Ancient Law, pp. 5, 7, 8.

[17] Holland, Jurisprudence, p. 57; Mackeldey, Roman Law, § 34. Both these writers refer to the rescript of Severus, which is found in Dig. 1, 3, 38, where the words are as follows: "Imperator noster Severus rescripsit in ambiguitatibus quæ ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter judicatarum auctoritatem vim legis obtinere debere."

under successive judges. No doubt it would be modified in details, as changes in the magistracy occurred, corresponding to the needs of changed social or industrial conditions, and, in some measure, to the views of the particular incumbent as to justice and equity. But largely it was made up of the rules adopted and enforced by his predecessors.[18] Now it is impossible to suppose that these rules were originally abstract propositions of law, evolved by the magistrate out of his own conceptions of justice and expedience, in advance of actual litigation before him. On the contrary, they must chiefly, if not always, have originated in actual forensic controversies, the solution of one such case suggesting to the prætor a general rule or principle which it would be fair and just to apply to the determination of all similar cases, which rule or principle would be incorporated in his edict, and, if approved, be adopted by his successors and so eventually find a place in the permanent body of jurisprudence. In this way, something very much like a "precedent," growing out of the decision of an actual case, would be established as the law for the decision of future cases, not in the way of a statute making it the law for the future, but in consequence of its voluntary adoption by the judge. A process not at all unlike this marked the origin and growth of the great system of English equity jurisprudence. Only, to form a clear idea of the growth of the prætorian edict, we should have to imagine each of the English chancellors, in the earlier times, beginning his administration by examining all the opinions of his predecessors, selecting those which commended themselves to his conscience and good sense, and drawing up from them a compilation of the rules and principles by which he meant to be governed; and, as to the later period of the law, we should have to imagine each incoming chancellor as receiving from his predecessor, and as adopting for his own, with some minor changes, such a compilation, handed down through successive administrations and gradually growing and expanding into a complete and perfect system. But neither the existence of the prætorian edict nor the prin-

[18] Mackeldey, Roman Law, § 36.

ciple on which it was formed ever succeeded in establishing in the Roman law any such respect for previous judicial decisions as that which lies at the base of the doctrine of precedents, as we understand it.

A less direct analogy to the growth of a system of precedents may be found in the deference paid to the opinions of jurists and their statutory adoption as rules of law. These "responsa prudentum" proceeded originally from any unofficial person who was learned in the law, but afterwards from a limited number of jurists who were specially designated or licensed for the purpose. They were sometimes answers to clients who sought information as to their legal rights or duties, but frequently also they were opinions furnished to the magistrates, upon their request, as to the proper decision to be given in new or doubtful cases before them. "The opinions of a jurist had originally only the weight that was due to his knowledge and genius; but on the transfer of sovereign power from the hands of the people to those of a monarch, the latter recognized the expediency of being able to direct and inspire the oracles of jurisprudence; and accordingly Augustus converted the profession of jurist into a sort of political function, giving the decisions of certain authorized jurists the force of law." [19] Later, under Hadrian, the responsa prudentum were defined as "the judgments and opinions of those who are permitted to establish laws (jura condere); and if they all concur in any decision, that which they so agree upon shall have the force of law; but if they differ, the judge shall be allowed to follow either opinion as he may choose." [20] But even the quasi-judicial authority of these professional opinions was finally abolished by Justinian. Indeed the system of administering the law according to the opinions of jurisconsults, inaugurated by his predecessors, and expanding with the enormous growth of five centuries, had brought about the chaotic condition which his compilation of the laws was meant to remedy. And to prevent its recurrence, he forbade the future publication of any commentaries or juristic treatises (save only translations into Greek from

[19] Poste's Gaius (2d Ed.) p. 37.

[20] Gaius, bk. 1, § 7.

the original Latin) or any "interpretations" of the law, under the severest penalties. Recognizing the fact that ambiguities might still be found to lurk even in his ideally perfect Digest and Code, Justinian further ordained that all such doubtful points should be referred by the judges to the emperor himself, as the supreme authority, and resolved by his decree.[21] And herein he asserted the principle which, by restricting the authority of judges, forever abolished the authority of precedents in the Roman law, and which has had an incalculable influence upon the jurisprudence of all those modern states which found their systems upon the civil law. For he asserted—and the assertion had the force of a constitutional provision—that "it belongs to the emperor alone both to ordain and to interpret the laws." [22]

In the meantime, however, the Roman emperors themselves had for ages constituted the supreme court of judicature, and their decisions were observed by the courts as rules for the determination of subsequent like causes, not because they had the authority of the "thing adjudged," but because all that emanated from the emperor had the force of law. For it must not be forgotten that, under the empire, no sharp line of distinction was drawn between judicial and legislative functions; and in point of fact, in the person of the emperor himself, they were very firmly and significantly united. Among the various forms of "constitutions," or ordinances proceeding directly from the imperial authority, those important for our present purpose were the "decreta" and the "rescripta." The former were judgments rendered in litigated suits either instituted originally before the emperor or his council or going up by way of appeal, while the latter were answers given by the prince in individual cases, in response to inquiries by parties in relation to pending causes or by the judges in regard to the administration of the law. There were many constitutions

[21] Code I, 17, 2, 21; Poste's Gaius (2d Ed.) p. 38; Markby, Elements of Law, p. 43.

[22] Code, I, 17, 2, 21, a constitution of the Emperor Justinian, A. D. 533.

of both classes which entered into and became a part of the law, affecting the private relations and dealings of parties, and the judgments therein contained became rules for future litigated or doubtful legal questions.[23] It is probable, however, that it was only gradually and as the power and authority of the throne increased to overwhelming proportions that these imperial decisions acquired the force of precedents. As remarked by a recent writer: "The truth perhaps was that originally decrees proceeding from the emperor had only the effect of those pronounced by lower magistrates, and merely settled the particular controversy; that naturally and gradually they acquired the character of precedents; but that old-fashioned lawyers of a conservative turn still clung to the ancient theory; and even Justinian inserted in his Code a rescript, originally published about a century before, which says of interlocutory decrees: 'Interlocutionibus quas in uno negotio judicantes protulimus, vel postea proferemus, non in commune præjudicantibus.'" [24] But while thus restricting the authority of merely interlocutory sentences, the same emperor expressly gave the sanction of law to the final determinations of himself and his successors, saying: "If his imperial majesty shall have judicially examined into a controversy, and pronounced his judgment as between the parties immediately concerned, all judges everywhere, within our dominions, shall understand that this is the law, not only with refer-

[23] Mackeldey, Roman Law, § 46. Compare Blackstone (Commentaries, vol. 1, p. 59), as follows: "When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing and take his opinion upon it. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions which had only the nature of things for their guide. The Emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts. He could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise, and he has preserved them all."

[24] Professor J. C. Gray, in 9 Harv. Law Rev. 27, 31.

ence to the cause in which the judgment is pronounced, but for all similar causes." [25] But whether this declaration had reference to the decreta or the rescripta, or to both, it is at least a plausible hypothesis that constitutions of the latter form were not regarded as emanating from the emperor in a judicial capacity, but as made by him in his legislative capacity. Such a constitution was an interpretation of the law, and, as we have already seen, it was a fundamental principle in the Roman law that the function of interpreting the laws was legislative and not judicial. Hence the authority of a rescriptum, as a rule for the solution of a similar question afterwards arising, did not at all depend on its being an authoritative decision as to the rule of law applicable to a given state of facts propounded for solution,—like a judicial precedent in English law,—but on the fact that it was a piece of legislation, corresponding quite closely to what we now call an "expository" or "declaratory" statute. As Professor Markby has observed: "There seems to have been a good deal of fluctuation under the Roman law as to the authority to be attributed to the imperial rescripts and decrees in particular cases. But if these were ever treated as generally binding, it seems to have been because the emperor was himself the supreme source of all authority and could legislate when and how he pleased. But no decisions of any tribunal had as such any authority whatsoever." [26] This was of course in pursuance of Justinian's plan of excluding from the courts everything except the written law as contained in his Corpus Juris and of reserving for the crown the sole right of interpreting and expounding it. And it was he who gave the deathblow to any lingering remnant of respect for judicial precedents, by enacting that "no judge or arbiter shall consider himself bound to follow any decisions which he shall think to have been wrongly made, and much more [shall he be free from the necessity of following] the opinions of even the most eminent præfects or other magistrates; for if any matter has been wrongly decided, the error ought not to

[25] Code, I, 14, 12 (Justinian, A. D. 529).
[26] Markby, Elements of Law, p. 58.

be extended into other causes; for judgment must be given not according to examples, but according to the laws." [27]

Modern Civil Law

Those countries, on the continent of Europe and elsewhere, which founded their jurisprudence on the Roman law, inherited from that system the theory that the function of interpreting the laws is legislative and not judicial, that, so far as concerns the law of a case as contrasted with the facts, the office of the judge is merely to seek out the rule of written law by which it is governed, and that, in its application, he is not in any way bound to follow the opinions of his predecessors. Accordingly, "elsewhere than in Great Britain and America, the judicial reports are comparatively few, since judicial judgments have no authority, and no higher rank, theoretically at least, than the expositions or commentaries of private writers." [28] Thus the Prussian code expressly provides that prior decisions shall not have the force of law, by enacting that "the opinions of law professors and the views taken by prior judges shall not be in any way considered in future decisions." [29] It is unnecessary to point out how directly contrary this is to the Anglo-American conception of the authority of precedents. But it produces one singular result, which has been noticed by Professor Gray, who says: "One point especially of the German theory seems very strange to a common-law lawyer. To such, the duty of a lower court to follow the precedents set it by the court of appeal seems one of the plainest of judicial obligations, but the German writers, almost to a man, unite in denying this duty." [30] But this accords well with the theory that all the law must be statutory, or, at least, that if anything of ancient customary law may still be allowed to survive, yet nothing must be added to the body of the written law by the indirect process of judicial legislation. For it is by the following of precedents that

[27] Code, VII, 45, 13 (Justinian, A. D. 529).

[28] Dillon, Laws and Jurisprudence of England and America, p. 173.

[29] Allgemeines Landrecht, Einleitung, § 6, as cited by Markby, Elements of Law, p. 59, and Holland, Jurisprudence, p. 57.

[30] Professor J. C. Gray, in 9 Harv. Law Rev. p. 33.

the latter is accomplished. Hence it is the practice, or at any rate it was the practice for a long time after the promulgation of the Prussian code, to refer all doubtful points of law arising in the courts to a body of law commissioners, who did not act as an appellate tribunal or in any judicial capacity whatever, but enacted and announced a declaratory statute on the occasion of every case so submitted to them; so that the law of the kingdom, supplementary to the code, did not consist of judicial decisions expository of it, but of acts of legislative interpretation issued directly by the government.[31] A similar provision is found in the Austrian code. But it goes even further than the German system in abolishing the rule of precedents, by expressly forbidding the application of all customary law, which, in practice, it is said, is regarded as excluding even that species of judicial usage which, elsewhere admitted, is a pale adumbration of the theory of precedents.[32] The code of France also contains a provision which prevents the ordinary judicial interpretation from becoming authoritative.[33] But although in strict theory, at least, however it may be in practice, the chief appellate court of that country is in no way bound to abide by its own former decisions in like cases, nor the inferior courts to follow its decisions as precedents, yet it is a fact worth noting that the decisions of French courts are cited elsewhere, not indeed as conclusive, but still as something very much like authoritative expositions of the law. Both the code and the jurisprudence of Louisiana resemble those of France in many particulars, and in such cases the supreme court of that state never hesitates to cite and rely on the judgments of the French courts, and not only those of the Cour de Cassation but of various provincial tribunals as well.[34] The codes of some other European countries do not explicitly forbid recurrence to prior decisions of the courts as authoritative evidence of the law; and this is said to be the case in Italy and in

[31] 2 Austin, Jurisprudence (Campbell's Ed.) § 958.

[32] Burg. Gesetzbuch (Austria) § 12. See Holland, Jurisprudence, p. 57; Markby, Elements of Law, p. 59, note.

[33] Code Civil Francais, art. 5.

[34] See, for example, Succession of Le Blanc, 37 La. Ann. 546.

Belgium. But "the rule in all those countries is substantially the same, namely, that previous decisions are instructive, but not authoritative, subject to certain special provisions of a strictly limited scope." [35] So also it is in Mexico, which inherited the civil law from Spain. The courts of that country are not governed by precedents and have no regular reports or records of adjudged cases.[36] And so, again in the direct line of inheritance, when the Republic of Texas was established, a provision was inserted in its constitution that "the tribunals and courts, being authorized solely to apply the laws, shall never interpret the same nor suspend their execution." [37] But it has been pointed out by an eminent writer, speaking of the difference between the English and the Roman view of precedents, that "When the two systems have come into competition, as they have done in the Province of Quebec, the Cape Colony, and other British possessions originally settled under continental systems of law, the method of ascribing exclusive authority to judicial decisions has invariably been accepted." [38]

But however strict the theory of the civil law, it is certain that, in the actual practice of the courts, the precedents set by former decisions do more or less positively influence the course of adjudication. The judgments of at least the higher courts in both France and Germany are regularly published and are available to the profession, and it is impossible that they should be wholly ignored by the judges. Though their authority is not imperative, as it would be with us, yet they exercise a somewhat indeterminate and unavowed, but none the less persuasive, influence in subsequent causes, as the judges would naturally be inclined to resort to them, on the one hand, for information and guidance, and, on the other hand, to avoid incongruous and conflicting rulings. Such provisions as are found in

[35] Holland, Jurisprudence, p. 57.

[36] Evey v. Mexican Cent. Ry. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

[37] See Houston v. Robertson's Adm'r, 2 Tex. 1, 26.

[38] Pollock, First Book of Jurisprudence, p. 340.

the French and Prussian codes respecting precedents "do not prevent judges from resorting to the opinions of those who preceded them for guidance, and this inevitably results in these opinions producing an influence which is of great importance, though wholly distinguished from the 'authority' of English decisions. French judges really rely on such opinions when they refer to 'la doctrine et la jurisprudence' or 'le point de vue juridique' [or 'la jurisprudence des arrêts']. German judges seem to have no hesitation in referring to treatises and to the 'Gerichtsgebrauch' or 'usus fori.' Thus a kind of customary law (Juristen recht) is formed by the courts, though it is said that it cannot be applied by the courts in Austria, because the application of all customary law is forbidden by legislation." [39] Moreover, according to Holland, "there have been of late some symptoms of an approximation between the two theories. While on the continent judicial decisions are reported with more care and listened to with more respect than formerly, indications are not wanting that in England and the United States they are beginning to be somewhat more freely criticised than has hitherto been usual." [40]

In English Law

In England, the doctrine of adherence to precedents may be traced back to a period of remote antiquity. It was no juristic accident, but a spontaneous growth, resulting inevitably from the conditions attending the birth and development of the law in its early stages, conditions differing most widely from those which prevailed in the Roman law. For it must not be forgotten that the enormous body of the English common law was not imposed upon the judges from without, but was created by them, bit by bit, as cases successively arose and were determined in the courts. When all due allowance is made for the survival of a certain amount of actual customary law, it remains true that the bulk of the common law does not owe its origin to any such source, but to the decisions of the courts. The fic-

[39] Markby, Elements of Law, p. 59, note. And see 2 Austin, Jurisprudence (Campbell's Ed.) § 958; Mackeldey, Roman Law, § 34.

[40] Holland, Jurisprudence, p. 58.

tion long prevailed that the judges merely discovered and applied a set of rules already existing in the customs of the people, and that their judgments therefore were no more than evidence of the existence of such rules. But the supposition that a complete and perfect system of law lurked in the usages of the people, which was recognized and drawn out into the light, piece by piece, as the courts had occasion to apply it, was historically about as close to the truth as the fiction of an original "social contract." [41] As, therefore, the common law grew by the successive adjudications of the courts, the rules already fixed and made determinate were no longer to be looked for in any supposititious usages or customs, but in the recorded judgments, and these acquired the authoritative force of precedents, nominally because they were indubitable evidence of existing law, but actually because they were sources of law and therefore regarded by succeeding judges as of constraining force. It would be vain to pretend that this notion of the sanctity of precedents prevailed, in pure theory, from the very earliest times. But it is not too much to say, within the limits of demonstrable historical truth, that the habit of consulting prior decisions and of being guided and influenced by them, if not controlled, began as soon as the publication of records or reports made the wisdom of the earlier judges generally available. Also it is clearly to be seen that the conception of a judicial precedent as possessing imperative force grew steadily and constantly, from these beginnings, until it became a fixed principle of English law at a time which, at least from the viewpoint of today, is sufficiently remote. Reports of cases in the English courts can be traced back as far as the close of the twelfth century and have been continued in unbroken regularity from at least the beginning of the fourteenth. "The reports are extant in a regular series," says Blackstone, "from the reign of King Edward the Second inclusive, and from this time to that of Henry the Eighth were taken by the prothonotaries or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the

[41] See Salmond, Jurisprudence (2d Ed.) p. 160.

denomination of the Year Books." "And it is much to be wished," continues the learned commentator, "that this beneficial custom had, under proper regulations, been continued to this day; for though King James the First, at the instance of Lord Bacon, appointed two reporters, with a handsome stipend, for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands." [42] At the time this

[42] 1 Bl. Comm. 71. Compare Markby, Elements of Law, pp. 56-58, where it is said: "Some record of the proceedings of the superior courts of justice was always kept, and we have a series of such records commencing as early as the 6 Ric. II (1194). These early records might, and probably did, afford some guide in future cases, though they were not drawn up with that object. Moreover, at least as early as the reign of Edward I, the practice had begun of drawing up, in addition to these records, reports of cases heard and determined, the main, and apparently the sole, object of which was to furnish judges with precedents to guide them in their future decisions. In these Year Books there is very little argument, but only an ascertainment by oral discussion of the points at issue, with the decision of the court. * * * Reference is also sometimes made by the reporter to other cases involving the same point. The later Year Books give the arguments somewhat more fully, but still we do not find previous cases frequently cited. From this we might be disposed to infer that the practice of citing cases in support of an argument or a judgment was still very rare even in the reign of Henry the Eighth, when the last Year Book was published. Yet this can hardly be so, for the reports of Plowden, in the reign of Edward VI, which are much fuller than the latest Year Books, show that cases were at that time freely cited, and it is not likely that the practice came suddenly into existence. Moreover, we can scarcely account for the existence of the Year Books at all unless we suppose that the lawyers studied them and made some use of them. The importance attached to the Year Books is further shown by the numerous reprints of them which were issued as soon as the art of printing was discovered, and also by the popularity of the abridgments made of them by Fitzherbert and Brooke. Probably, therefore, the influence of precedent upon the decisions of the judges is not to be measured by the number of cases quoted in the Year Books. It is, however, always as indicating the custom of England, and not as authority, that the decisions of earlier judges were used during all this period and long afterwards. In the patent of James I for the appointment of official reporters, it is indeed recited that the common law of

was written, if not at an earlier day, "the view was established that the duty of the judge is to abide by former precedents; and it has long been well understood that our courts are arranged in this respect in a regular hierarchy, those of each grade being bound by the decisions of those of the same or a higher grade, while the House of Lords is bound by its own decisions." [48] Thus we are to attribute the doctrine of precedents, as an ineradicable principle of our law, first to the conditions which attended the development of the law, and second to the influence, and in some measure to the deliberate purpose, of the judges. This last point is very clearly stated by an able contemporary writer, in the following terms: "It seems clear that we must attribute this feature of English law to the peculiarly powerful and authoritative position which has been at all times occupied by English judges. From the earliest times, the judges of the king's courts have been a small and compact

England is principally declared by the grave resolutions and arrests of the reverend and learned judges upon the cases that come before them from time to time, and that the doubts and questions likewise which arise upon the exposition of statute law are by the same means cleared and ruled. Nevertheless we find Blackstone still saying that the first and chief corner-stone of the laws of England is general and immemorial custom. But long before Blackstone's time, and in some measure perhaps owing to the patent of James I, a very important change had taken place in the view held by judges as to the force of prior decisions. These decisions were at first evidence only of what the practice had been, guiding but not compelling those who consulted them to a conclusion. But when Blackstone wrote, each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard. This important change was very gradual, and the practice was very likely not altogether uniform. As the judges became conscious of it, they became much more careful of their expressions, and gave much more elaborate explanations of their reasons. They also betrayed greater diffidence in dealing with new cases to which no rule was applicable, cases of first impression, as they were called; and they introduced the curious practice of occasionally appending to a decision an expression of desire that it was not to be drawn into a precedent."

[48] Holland, Jurisprudence, p. 57, citing Beamish v. Beamish, 9 H. L. Cas. 339; Caledonian Ry. Co. v. Walker's Trustees, L. R. 7 App. Cas. 275.

body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law. Of this system they were the creators and authoritative interpreters, and they did their work with little interference either from local custom or from legislation. The centralization and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable on any other system. The authority of precedents was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England, the bench has always given law to the bar; in Rome, it was the other way about, for in Rome there was no permanent body of professional judges capable of doing the work that has been done for centuries in England by the royal courts." [44]

Growth and Development of Law as Affected by Different Theories of Precedents

From what has been said it is easy to perceive how differently the Roman and the English theory of precedents have affected the growth and development of the law. Under the former system, the judge has nothing to do with interpreting the law, much less founding or shaping it. The supposition is that the statute book contains a rule applicable to every conceivable case. And if it does not, the defect must be supplied by legislation, not by judicial industry or activity. The judge's function, therefore, is practically confined to making findings of fact (to use the modern terminology); his finding of law consists merely in pointing to a section of the code. Naturally, then, his decision has no value as a precedent; and naturally also it can contribute nothing to the development of the law. Such a system of law is of course lacking in flexibility, though it may excel in symmetry. In the face of the unforeseen case, it presents no adaptability; and the solution of problems arising out of changing social conditions or the expansion

[44] Salmond, Jurisprudence (2d Ed.) p. 160.

of business must await legislative action.[45] On the other hand, the English or American judge solves a question of first impression by the application of legal analogies, of the spirit and reason of the law, and of those principles of justice, good sense, and convenience which lie at the base of the law itself. When similar cases arise in the future, his decision becomes a precedent to be observed and followed by other judges, and thus the law grows, not only by the constant adaptation of fundamental principles to ever changing conditions, but actually also by the judicial evolution of new principles to meet new circumstances. This process in action may appropriately be shown by quotations from a few judicial opinions. Thus it is declared by the Supreme Court of Ohio that "the absence of a direct or at least analogous authority, it is certain, with a careful judge, tends to create uncertainty and doubt, not unfrequently, whether a position assumed as a basis of a right to recover can be sustained. But cases do, however, often occur, in the multifarious transactions and relations of mankind, when it is by no means an insuperable objection to the remedy sought to be obtained that there is no direct adjudication in point. Rules of law must sometimes of necessity be extended to suit the local condition and meet the exigencies of every people. It is one of the maxims of the common law that for every injury a remedy is given, and when the justice of a cause stares me fully in the face, I will say, with Mr. Justice Eyre, that I do not feel myself pleased to be knocked down with formal objections. If there is no known mode of redress, it is the duty of the court, in such case, to open some new channel through which a remedy may be obtained." [46] To the same effect also speaks one of the United States courts: "It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the

[45] Code, I, 17, 2, 21; Markby, Elements of Law, p. 43.
[46] Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605.

case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression rightly decided today, centuries hence will be the common law, though not a part of that body of law now called by that name." [47] To sum up, then, in the words of Sir William Markby, "thus it comes to pass that English case-law does for us what the Roman law does for the rest of western Europe. And this difference between our common law and the common law of continental Europe has produced a marked difference between our own and foreign legal systems. Where the principles of the Roman law are adopted, the advance must always be made in certain lines. An English or American judge can go wherever his good sense leads him. The result has been that whilst the law of continental Europe is formally correct it is not always easily adapted to the changing wants of those among whom it is administered. On the other hand, the English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and not infrequently in conflict with itself, is yet a system under which justice can be done." [48]

PRECEDENTS IN EQUITY JURISPRUDENCE

5. The rule of adherence to judicial precedents prevails in courts of equity, no less than in courts of law.

From what we know of the jealousy and bitterness existing in early times in England between the common-law lawyers and judges on the one hand and the chancellors on the other, it is not surprising to find the former accus-

[47] Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868, 35 C. C. A. 62.
[48] Markby, Elements of Law, p. 58.

ing the latter of a lawless disregard of precedents, and of deciding cases according to no more certain standard than the opinions and notions of the particular chancellor. Blackstone mentions as among those who had entertained and spread the idea that the court of equity was bound by no rule of adherence to precedents, "our principal antiquaries and lawyers, Spelman, Coke, Lambard, and Selden, and even the great Bacon himself." And he quotes the assertion of Selden in this connection, while characterizing it as containing "more pleasantry than truth," as follows: "For law we have a measure and know what to trust to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be. One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience." [49] It is no doubt true that in the early and formative period of chancery jurisprudence, no general rules or fixed principles were applied to the determination of causes. But probably this was, for the most part, rather in consequence of the lack of any precedents to guide the chancellor than from his conscious disregard of those which might have been found. "In the infancy of our courts of equity," says Blackstone, "before their jurisdiction was settled, the chancellors, partly from their ignorance of the law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden pro re nata, with more probity of intention than knowledge of the

[49] 3 Bl. Comm. 432, note. The quotation is from Selden's "Table Talk," published posthumously in 1689. John Selden was born in 1584 and died in 1654. It may be noted that this same remark of his was once quoted, and with great resentment, by Lord Eldon.

subject; founded on no settled principles, as being never designed, and therefore never used, for precedents." [50] But this stage was only transitional. As cases in equity multiplied and began to resolve themselves into types and classes, often recurring, the decisions of former chancellors were more freely consulted, and the principles on which they were founded began to assume the shape of fixed rules. Indeed, there was no other way in which a system of equity jurisprudence could be built up. In the court of chancery, the theory that a judicial decision did not make the law, but only declared a law previously existing in general and immemorial custom, "never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court. There could be no pretence that the principles of equity were founded either in custom or legislation, for it was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each chancellor made the law for himself and his successors." [51] And the fact that, even at a remote day, the chancellors not only understood the use of the precedent, but had a sincere conviction of the wisdom and propriety of adhering to former decisions, is susceptible of historical proof. "Before the splendid abilities of Lord Nottingham had shone forth in the court of chancery and suggested to his successors the outlines of a scientific system, in a great cause there depending [Fry v. Porter, 1 Mod. 300, 307] we find the chief justice of England referring himself to former adjudications. At which the other chief justice [of the common pleas] expressed some astonishment, urging this dilemma, that if any precedent could be produced the same with the case before them, the reason and equity would be the same in itself, and if the precedent be not the same it is not to be cited, being not to that purpose. But the lord keeper [lord chancellor] properly correcting him, said 'certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us, and besides, the

[50] 3 Bl. Comm. 433.
[51] Salmond, Jurisprudence (2d Ed.) p. 163.

authority of those that made them is much to be regarded. We shall suppose that they did it upon great consideration and weighing of the matter; and it would be very strange and ill if we should disturb and set aside what has been the course for a long series of time and ages.' Thereupon it was ordered that they should be attended with precedents before they gave their opinions. Since that time above a century has elapsed,[52] during which the copious variety of suits determined in chancery has rendered its rules of decision proportionably less discretionary and vague. So that a perfectly new point, or res integra as it is called, unaffected by former adjudications, occurs now very rarely in this court; and the studious attendant frequently hears more cases referred to and commented upon here than in the courts of law." [53] And at any rate in Blackstone's time, it had become true that "the system of our courts of equity is a labored connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. * * * Sometimes a precdent is so strictly followed that a particular judgment founded on special circumstances gives rise to a general rule. In short, if a court of equity in England did really act, as so many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case." [54]

Admittedly, in theory, each case in equity is to be determined on its own facts and according to the conscience of the chancellor. But similar facts call for the application of the same rule, whether it be a hard and fast rule of law, or a rule of good morals and fair dealing; and the conscience of the chancellor is enlightened by the decisions of his predecessors in like cases. Indeed the existing

[52] Fry v. Porter was decided in the 22 Car. II; that is, about 1670.

[53] Wooddeson, Law Lectures, vol. 1, p. 200.

[54] 3 Bl. Comm. 432.

body of equity law is almost wholly made up of general rules and principles derived, by a gradual process of evolution, from many adjudged cases, and owes its stability, as well as its general character and symmetry, to a faithful following of good precedents.[55] This has been repeatedly admitted and declared by the chancery courts. "A court of equity is as much bound by positive rules and general maxims concerning property (though the reason of them may now have ceased) as a court of law is."[56] "The law is clear and courts of equity ought to follow it, otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be secundum discretionem boni viri, yet when it is asked, vir bonus est quis? the answer is, qui consulta patrum qui leges juraque servat."[57] So again, by Lord Chancellor Redesdale: "There are certain principles on which courts of equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of law proceed."[58] This is also the established doctrine of the American courts. Thus, the Supreme Court of Oregon, reviewing the action of the court below in an equity case, says: "This seems to have been a just disposition of the affair in view of the circumstances of the particular case, and we would gladly sustain it if we could do so in accordance with legal principles. But equity, like the common law, must be controlled by general rules, which are as unalterable in the one case as in the other."[59]

[55] See 1 Story, Eq. Jur. § 18 et seq. And see Edmunds v. Povey, 1 Vern. 187.

[56] Long v. Laming, 2 Burr. 1108.

[57] Cowper v. Cowper, 2 P. Wms. 720, 753.

[58] Bond v. Hopkins, 1 Sch. & Lef. 413, 428.

[59] Finlayson v. Finlayson, 17 Or. 347, 21 Pac. 57, 3 L. R. A. 801, 11 Am. St. Rep. 836. And see Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67.

But still the system of chancery jurisprudence has not crystallized into an irrefragable set of formal rules, to the exclusion of the ethical principle on which it was founded. There still survives the idea of an "equity" (in the sense of a moral standard) more precious than precedent. This is aptly illustrated by a criticism advanced by the Master of the Rolls, Jessel, against a decision by Justice Fry. He said: "It appears to me, speaking with the greatest possible respect of such an eminent master of equity as Mr. Justice Fry, that he has entirely misconceived the proper use of authorities in holding himself to be bound by a long line of authorities to decide against that which he saw most clearly was good equity; in other words, he decided against his own opinion as to the rules of equity, in obedience, as he thought, to a series of authorities opposed, as he conceived, to all principle, because he thought he was bound so to do, as it appears to me in utter oblivion of what I will take the liberty of stating is the right mode of viewing authorities." [60]

There remains to consider the use and value of precedents as between the courts of equity and those of law. It is a well known maxim that "equity follows the law," that is to say, a court of chancery will adopt and follow the rules of law in all cases in which those rules may in terms be applicable, and in dealing with cases of an equitable nature, will adopt and follow the analogies furnished by the rules of law, and these of course are to be sought in the decided cases.[61] But the converse of this rule is by no means equally true. The decisions of courts of equity are seldom trustworthy guides in matters arising under the common law, and they should be sparingly and carefully used. As remarked by Justice Buller, in a common-law case before him: "For the plaintiffs several cases were quoted from the court of chancery, to which my answer is that none of them are of the least avail in a court of law, because the two courts act on different

[60] In re Hallett's Estate, 13 Ch. Div. 696, 712.

[61] See, for example, Watts v. Ball, 1 P. Wms. 109; Cowper v. Cowper, 2 P. Wms. 753.

principles, and that which is the groundwork and foundation of the decision in courts of equity is directly repugnant to every rule and determination of courts of law. When a rule of property is settled in a court of equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity; for I think it absurd and injurious to the community that different rules should prevail in different courts on the same subject. But before we adopt the doctrines of courts of equity, we must see that they do not act in violation of settled rules of law, and that we have the power to follow up the relief given by a court of equity to the extent which makes their proceedings just and reasonable." [62] To cite a single example, the power exercised by a court of equity in compelling disclosures on a bill of discovery, is not a precedent which would justify a court of law in compelling the plaintiff in a personal injury case to submit to a physical examination.[63] Yet as questions of common law often arise and are resolved in equity courts, their judgments in such matters might often be a source of enlightenment to common-law courts, and should be accorded a persuasive authority if not a controlling force. The Court of Exchequer was once admonished that "courts of law should go still further than they commonly do in considering questions of this nature. They should enquire of decisions in courts of equity, not for points founded on determinations merely equitable, but for legal judgments proceeding upon legal grounds, such as those courts of equity have for a long series of years been in the daily habit of pronouncing as the foundation of their directions and decrees." [64]

[62] Farr v. Newman, 4 Durn. & E. 636. And see Wilson's Appeal, 108 Pa. 344, 56 Am. Rep. 214.

[63] Larson v. Salt Lake City, 34 Utah, 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

[64] Smith v. Doe, 7 Price, 509.

SCOPE AND LIMITATIONS OF A PRECEDENT

6. It is the decision in a case, and not the opinion of the court, which makes the precedent. The opinion may state, explain, and justify the conclusion of the court, but has no authority beyond the point or points actually decided.

7. But it is not alone the concrete decision in the particular case which measures its scope as a precedent, but the legal reason for the decision, the "ratio decidendi," that is, the underlying rule or principle of law which, applied to the facts, caused the particular judgment to be given.

8. A decision is authority for rules or principles of law tacitly assumed by the court as a basis for its consideration and determination of the specific questions involved, provided they are so essentially involved in the decision that the particular judgment could not logically have been given without their recognition and application; but not as to propositions underlying the decision which were assumed by the court without examination simply because they were conceded or assumed by the parties or counsel.

9. Where several questions are presented by the record and are considered and deliberately decided by the court, all of which lead up to the final conclusion and have influence in determining the judgment to be given, all are embraced within the authority of the case as a precedent.

10. A decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given.

Opinion and Decision Distinguished

It is important to be noticed, as a fundamental principle in the study of precedents, that it is the decision, that is, the judgment rendered in the case, and not the opinion of the court, which settles the point of law involved and makes the precedent. The decision is the conclusion of the court on the premises; the opinion sets forth the reasons of the determination, and usually states and explains them at greater or less length; and sometimes justifies and supports them by a copious citation of authorities and a wealth of argument, illustration, or analogy. The opinion, disclosing the actual determination of the court and the reasons of the judge for his decision, is of course of great importance in the information it imparts as to the principles of law which influenced the court and were supposed to govern the case, and which should guide litigants. But the opinion may far outrun the decision, not only in the way of including inferences and illustrations, but also in the way of noticing points not essential to the final conclusion or laying down principles of law far broader than is necessary for the particular case in judgment. In that case, it has no authority as a precedent beyond the point or points actually and necessarily decided.[65] So, also, it is only the precise decision made that is authoritative in subsequent cases, and not a proposition of law which, at most, could only be inferred or implied from the point actually decided.[66] Again, different judges may agree as to a conclusion of law, though they do not agree as to the propositions of law on which it should be based. "The members of a court often agree in a decision, but differ decidedly as to the reasons or principles by which their

[65] Wells v. Garbutt, 132 N. Y. 430, 30 N. E. 978, commenting upon the extent of the authority of Lampman v. Milks, 21 N. Y. 506, where it is said, "the discussion outran the decision." And see Love v. Miller, 53 Ind. 294, 21 Am. Rep. 192, where it is said that there is nothing authoritative in a case except what is required to be decided to reach the final judgment, and what, by the judgment, becomes res judicata between the parties as to the subject-matter of the suit.

[66] Broadwater v. Wabash R. Co., 212 Mo. 437, 110 S. W. 1084.

minds have been led to a common conclusion. It is therefore the conclusion only, and not the process by which it has been reached, which is the decision of the court and which has the force of a precedent in other cases." [67] On the other hand, even if there is no opinion written or filed, the decision is still a precedent for the similar disposition of similar cases. In that event, its nature and exact scope are to be ascertained by examining the record, to find the precise point of law which it involved, and considering the judgment given thereon. Further, it must be remembered that the force of a precedent resides in the rule or principle of law which it enunciates. This, it is true, is to be restricted to the facts in the particular case, and hence recitals of the facts in the opinion of the court are highly important as defining the exact boundaries of the legal question upon which the decision turned. But they do not constitute a part of the adjudication. At least, as stated by the appellate court in Illinois, a statement of facts in an opinion of the supreme court, if it can in any view be regarded as an adjudication on matters of fact, is not binding on parties to a separate action who were not parties to the adjudication.[68] As a corollary to the main rule, it may be noticed that, where the trial court files an opinion in support of its judgment, and the judgment is affirmed on appeal without the filing of any opinion by the appellate court, the decision of the latter court is authority for the precise point determined and no more; it does not put the appellate court in the position of approving or guarantying all the reasons given or opinions expressed by the court below.[69]

Ratio Decidendi

The decision in a given case always is or should be concrete, as, that the plaintiff is or is not entitled to recover, that the judgment of the court below should be affirmed

[67] Lucas v. Board of Com'rs of Tippecanoe County, 44 Ind. 524, 541.

[68] Gage v. Busse, 7 Ill. App. 433.

[69] Rogers v. Decker, 131 N. Y. 490, 30 N. E. 571; Powers v. Smith, 80 S. C. 110, 61 S. E. 222.

or reversed, that the prisoner should be discharged, the writ dismissed, etc. But this is not what is meant by the decision, as the term is used in relation to judicial precedents. Back of the particular judgment given lies the legal reason for giving it, or the juridical motive which caused the case to be decided as it was decided. This is called the "ratio decidendi." It is of course founded on the facts of the particular case, but is capable of being abstracted from them and generalized into the form of a proposition of law, or a series of such propositions, and, according to the theory of precedents, it is this doctrine or principle of law, held to govern the rights of the parties in a particular case and to determine the judgment which should be given therein, for which that case stands as an authority.[70] The principle may or may not be explicitly set forth in the opinion of the court. Sometimes it is assumed, and the reasoning of the court is directed to the application of the rule to the special state of facts before it. Sometimes the rule is categorically or broadly stated. But it is not the very words of the court, but the underlying principle of law, which fixes the position of the decision as an authority. Even if the opinion of the court should be concerned with unnecessary considerations, or should state the proposition of law imperfectly or incorrectly, yet there is a proposition necessarily involved in the decision and without which the judgment in the case could not have been given; and it is this proposition which is established by the decision (so far as it goes) and for which alone the case may be cited as an authority. The fact that a particular case was decided in a particular way is an argument to induce the courts to decide a similar case in a similar way, even though the judges, in the first case, imperfectly apprehended, or incorrectly stated, the

[70] "A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the 'ratio decidendi.' The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large." Salmond, Jurisprudence (2d Ed.) p. 174.

legal reason which led them to their decision.[71] "Without minutely examining all the cases," says Lord Kenyon, "or saying whether I do or do not agree with them, it is sufficient for me to abide by the principle established by them; the principle is the thing which we are to extract from cases, and to apply it in the decision of other cases." [72]

Principles Assumed by the Court

If the case could not have been decided as it was without the recognition and application of a given rule or principle of law, the decision is an authority for that rule or principle, although it may not have been expressly stated or mentioned by the court, but only tacitly assumed. This principle is referred to by the Supreme Court of Alabama in the following statement: "It was contended in the discussion of this case that the only point decided, or in the mind of the court, was that made in the argument. The result of that position would be to take from judicial decisions, where there is no opinion, the authority of an adjudication upon all propositions which were too plain or too well recognized by the bench and bar to be questioned; and thus the undisputed and universal sanction of a legal principle would become a barrier to proof by judicial decisions of its existence. It better accords with reason to regard a judicial tribunal as asserting, and intending to assert, every proposition which is indispensable to the conclusions expressed, and necessarily involved in it, at least when the contrary does not appear." [73] Perhaps this matter may be made more plain by a specific illustration. Let it be supposed that an appellate court reverses a judgment for the plaintiff rendered in the court below, in an action for damages caused by the alleged negligent conduct of the defendant, the particular ground for the decision being that the evidence shows such contributory negligence on the part of the plaintiff as should have prevented a recovery. The fundamental principle of law involved in this decision is that, in actions of this character,

[71] See 2 Austin, Jurisprudence (Campbell's Ed.) § 908.
[72] Lord Walpole v. Earl of Cholmondeley, 7 Durn. & E. 148.
[73] Bloodgood v. Grasey, 31 Ala. 575, 587.

the plaintiff cannot recover if it is shown that the accident would not have happened but for his own negligence. Unless this principle were recognized and applied, the appellate court could not render the decision it has rendered. Yet the principle may not even be mentioned in the decision. The opinion may be wholly taken up with a consideration of the facts in the case, as tending to prove or disprove contributory negligence. Nevertheless the decision will be an authority supporting the general rule as to contributory negligence, because that rule was necessarily involved or implied in the judgment. To illustrate further, a case in the court below involved the question whether a certain corporation had a legal right to collect tolls for passage over its road, and, this being decided in the negative, a further question was as to whether injunction or quo warranto was the appropriate remedy. The court granted an injunction. On appeal, the cause was heard and determined on its merits and the injunction was sustained, but the question was not raised or discussed in the supreme court as to the form of remedy. Nevertheless, it was considered that its action in entertaining jurisdiction and administering relief in that form had the effect of an authoritative adjudication of the latter question.[74] So again, the promulgation of a general rule by a court of equity implies a decision that it possesses the power to make such a rule, and constitutes a precedent for such action.[75] But it is said that the mere granting of a writ of error is not generally a judicial decision or conclusive as to any rule or principle of law.[76]

Same; Jurisdiction

The general rule above stated must be taken subject to the exception that the mere fact of a court's assuming jurisdiction of a particular action, when its jurisdiction is not challenged nor any suggestion made as to the want of it, is not a judicial decision that it has jurisdiction of

[74] State v. Louisiana, B. G. & A. G. Road Co., 116 Mo. App. 175, 92 S. W. 153.

[75] In re Du Pont, 8 Del. Ch. 442, 68 Atl. 399.

[76] Riggins v. City of Waco, 40 Tex. Civ. App. 569, 90 S. W. 657.

that class of actions, and therefore is not a precedent in any subsequent case when the question is directly presented for determination.[77]

Same; Assumption or Concession of Parties or Counsel

The authority of a precedent extends only to rules or principles of law expressly decided or tacitly assumed by the court itself. In either case, there must have been an application of the judicial mind to the question of law involved, whether the result is explicitly stated or not. Hence when counsel in the argument of a case assume a certain principle advanced by them as correct law, and the court decides the case upon the assumption thus made by counsel, without discussing the correctness of the assumption, the opinion is not authority as to the legal validity of the principle so taken for granted.[78] The rule is the same as to matters which, without being submitted to the court for determination, are simply treated as settled by the parties on both sides without objection.[79]

Several Questions in the Case

It is seldom that a case in an appellate court will be found to involve but a single question. More frequently, many distinct and separable propositions of law are argued by counsel and considered by the court. For instance, the same case may present a question as to the competency of a juror, a question as to the admissibility of certain evidence, and a question as to the correctness of certain instructions given to the jury. So, the constitutionality of a statute may be attacked on many different grounds. In many cases before the Supreme Court of the United States, a preliminary question as to jurisdiction is raised, as well as the main question on the merits. In such cases, it is generally considered that the decision is an authority on each and every point which, being really and substan-

[77] New v. Territory of Oklahoma, 195 U. S. 252, 25 Sup. Ct. 68, 49 L. Ed. 182; Bratsch v. People, 195 Ill. 165, 62 N. E. 895.

[78] Donner v. Palmer, 31 Cal. 500; State ex rel. Wine v. Keokuk & W. R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222; Hart v. Chemical Nat. Bank (Miss.) 27 South. 926.

[79] City of Logansport v. La Rose, 99 Ind. 117.

tially involved in the case, was considered by the court and passed upon, not by way of analogy or illustration, but as affecting the judgment to be given.[80] If the facts present a number of points, it is within the proper office of the court to determine any or all of them; and when an appellate court has announced a decision upon several points involved, an inferior tribunal cannot select one as the true resolution of the court, and reject the others as needlessly decided; but the rule is that every proposition of law enunciated, if actually involved in the facts of the case, is to be taken as an authoritative precedent.[81]

On a narrower view, however, the exact weight as a precedent of a decision involving rulings on several points will depend upon the disposition which is made of the appeal or writ of error. If several points are urged against the judgment of the court below, but all of them are found in favor of the appellee, the decision is an authority on each of such points, because a finding on each of them was necessary to the disposition which was made of the case.[82] If, on the other hand, all of the points are found in favor of the appellant, and the judgment is reversed, the decision cannot be regarded as an authority of the strongest kind on any of such points, unless the court specifies the ground for its judgment of reversal; because a finding against the judgment on any one of such points would be sufficient to require its reversal, and therefore the decision on the other points must be regarded as unnecessary to the determination of the case. If some of the points are ruled in favor of one party, and some in favor of the other, the same principle applies. If the judgment is reversed, the decision on the points found in favor of the appellee is immaterial and not authority. If the judgment is affirmed, then the points found in favor of the appellant must be

[80] Brown v. Chicago & N. W. Ry. Co., 102 Wis. 137, 78 N. W. 771, 44 L. R. A. 579; Boydson v. Goodrich, 49 Mich. 65, 12 N. W. 913; King v. Pauly (Cal.) 115 Pac. 210.

[81] Maddox v. United States, 5 Ct. Cl. 372.

[82] See State ex rel. Bailey v. Brookhart, 113 Iowa, 250, 84 N. W. 1064.

considered as of no importance, because if they were material, the judgment could not have been affirmed.

But by many of the courts this narrow and technical view is not regarded with favor. Thus, in a case in Wisconsin, a bill in equity was dismissed in the court below, and on an appeal two points of law were raised and argued by counsel for the defendant: first, that the damages complained of by the plaintiff were incidental merely and not such as would entitle him to recover in any action; second, that, assuming that he could recover in a proper action, yet his bill in equity was properly dismissed, that not being an appropriate remedy. The appellate court ruled the first point in favor of the plaintiff; that is, it was held that he could recover damages in a proper form of action. It found the second point in favor of the defendant; that is, it was held that the bill in equity was properly dismissed. When the case came again before the appellate court, it was contended that so much of the former opinion as related to the plaintiff's right to recover in a proper action was merely obiter dictum, because the ruling on the second point, as to the dismissal of the bill in equity, was sufficient to dispose of the appeal, and rendered any other ruling in the case unnecessary. But it was said that the first point, as it had been fairly presented by the bill, urged and relied upon on the argument, and considered and deliberately passed upon by the court, was so far involved in the case that the opinion expressed with regard to it could not reasonably be called a mere dictum.[88] So, in a case in New York, exception was taken to the action taken by the trial court in admitting a letter in evidence against the defendant's objection. On appeal, it was held that the objection was well taken, and that the trial court erred in admitting the letter. But as the appellate court was of the opinion that the letter did not prejudice the defendant, it affirmed the judgment. Afterwards, when the authority of this decision as a precedent was called in question in the same court, it was said: "It is claimed that the decision upon the point of the admissibility of the letter was

[88] Buchner v. Chicago, M. & N. W. R. Co., 60 Wis. 264, 19 N. W. 56.

unnecessary and therefore is not binding. The question was properly raised and was decided. Its decision naturally preceded the decision of the subsequent question, and the declaration of the court was not obiter." [84] So in Maryland it is said that, where a question of general interest is supposed to be involved in a case, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, a decision made under such circumstances cannot be shorn of its authority as a precedent by showing that it was not called for by the record.[85] So again, in New York, the doctrine is that a decision by the Court of Appeals, pronouncing against the constitutional validity of a statute, will be respected and followed by the intermediate courts in subsequent actions based on the statute, although such ruling was not necessary to the determination of the case before the Court of Appeals.[86] And on the same principle, it is held that where a question is directly involved in the case, and is determined in the court below, and the ruling is assigned as error, and the question is argued in the appellate court and distinctly decided there, the decision is not obiter, although the case is disposed of on other grounds.[87]

If there were two or more points in a case, either of which was sufficient to determine the disposition which should be made of it, and the conclusion of the court is expressly based on one only of such points, the case is not an authority upon any other of the points involved, although the same may have been discussed and reasoned out by the court in its opinion. But the fact that a decision might have been put upon a different ground, existing in the case, does not place the actual decision, upon a ground also arising, although less satisfactory, in the category of a dictum.[88] And where the record fairly presents two

[84] Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138.

[85] Alexander v. Worthington, 5 Md. 488.

[86] Ryan v. City of New York, 78 App. Div. 134, 79 N. Y. Supp. 599.

[87] Watson v. St. Louis, I. M. & S. Ry. Co. (C. C.) 169 Fed. 942.

[88] Clark v. Thomas, 4 Heisk. (Tenn.) 419; Des Moines St. R. Co. v. Des Moines B. G. St. R. Co., 73 Iowa, 513, 33 N. W. 610.

points upon the merits in a case, upon either of which the appellate court might rest its decision, and the court actually decides both, without indicating that it is intended to rest the judgment upon one rather than the other, it cannot be said that the decision upon either of these points is dictum.[89]

Questions Not Raised or Decided

Questions in a case which were not raised by the parties, not presented to the attention of the court, and not considered by the judges, are not concluded by the decision in the case, and the judgment is not an authority upon such questions, even though they are logically present in the case and might have been argued as affecting its decision, and even though such questions, if raised and deliberated upon, would have caused a different judgment to be given.[90] On this principle, the question of the constitutionality of a statute is never concluded by any number of decisions construing the act and applying it to particular states of facts. "The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity, when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts because that point might have been raised and determined in the first instance." [91] So, if an appeal is taken from a judgment of conviction in a trial for murder, and numerous

[89] Starr v. Stark, 2 Sawy. 603, Fed. Cas. No. 13,317; Union Pac. R. Co. v. Mason City & Ft. D. R. Co., 128 Fed. 230, 64 C. C. A. 348; Hawes v. Contra Costa Water Co., 5 Sawy. 287, Fed. Cas. No. 6,235.

[90] State v. Pugh, 43 Ohio St. 98, 121, 1 N. E. 439; Com. ex rel. Pughe v. Davis, 109 Pa. 128; In re Henderson, 33 App. Div. 545, 53 N. Y. Supp. 957; Molony v. Dows, 8 Abb. Prac. (N. Y.) 316; Broadwater v. Wabash R. Co., 212 Mo. 437, 110 S. W. 1084; Knight v. St. Louis, I. M. & S. Ry. Co., 40 Ill. App. 471; Molnet v. Burnham, Stoepel & Co., 143 Mich. 489, 106 N. W. 1126; Atwood v. City of Sault Ste. Marie, 141 Mich. 295, 104 N. W. 649; Larson v. First Nat. Bank, 66 Neb. 595, 92 N. W. 729; Hough v. Porter, 51 Or. 318, 95 Pac. 732; Hilton v. Sloan (Utah) 108 Pac. 689.

[91] Boyd v. Alabama, 94 U. S. 645, 648, 24 L. Ed. 302.

objections are urged and considered by the appellate court, including some objections to the form of the indictment, and the judgment is affirmed, this is to be considered as settling the law only as to those points which were so argued and considered. If afterwards a question is raised as to the sufficiency of an indictment, which might have been raised in the former case, and which, if raised, would have caused the judgment below to be reversed instead of affirmed, but which in fact was not raised or thought of, the decision in the former case is not to be regarded as an authority to the effect that the indictment in that case was in all respects good and sufficient. In other words, in the latter case, the court is not precluded, by anything in the former case, from considering the question newly raised as still undetermined.[92] Again, the mere failure of a reviewing court to point out objections to a ruling or instruction given below, other than those assigned, must not be construed as approving the ruling or instruction in such other respects.[93] So, a case in which mandamus was improperly allowed, there being no suggestion that this was not the proper remedy, and that question not occurring to the court, is not a precedent which the court is bound to follow when the impropriety of the remedy is urged in similar cases.[94] Neither is a court bound to approve a declaration in a suit merely because it is a copy of that employed in another case, which was appealed to the supreme court and no objection to the declaration there pointed out, if it does not appear that the question of its sufficiency was called to the attention of the appellate court.[95] And the same principle applies to questions which the court expressly leaves open and undetermined, because it deems them unnecessary to the decision of the particular issue before it. An analogous rule is to be applied in cases where the judges of an appellate court concur in

[92] Fouts v. State, 8 Ohio St. 98, 123; State v. Pugh, 43 Ohio St. 98, 1 N. E. 439.

[93] Young v. State Bank of Marshall, 54 Tex. Civ. App. 206, 117 S. W. 476.

[94] Cosgrove v. Wayne Circuit Judge, 144 Mich. 682, 108 N. W. 361.

[95] Knight v. St. Louis, I. M. & S. Ry. Co., 40 Ill. App. 471.

the judgment to be rendered, but differ as to the particular grounds in such a way that there is no majority opinion on any specific question. Such questions are to be treated as if not raised or determined in the case. "If, for example," says the court in New York, "an appeal to this court involved distinct and separate defenses to an action, such as usury and the statute of limitations, and five of the judges should concur in a reversal, two of them placing their decision on the one ground and three on the other, the judgment might be reversed, but nothing else would be decided. Such a determination of the appeal would be no authority, even in the same case." [96] But it is not an invariable test of the authority of a decision as a precedent to inquire whether or not the particular question was raised in the briefs of counsel or discussed on their oral argument. In some instances, it is said, in order to arrive at a just decision upon the merits, a court may take notice of a point not argued by counsel, if the facts from which the question emerges and which give it precise definition are present in the record before the court or set forth in the briefs.[97]

INTERPRETATION OF JUDICIAL DECISIONS

11. The language of a judicial decision is always to be construed with reference to the circumstances of the particular case and the question actually under consideration; and the authority of the decision, as a precedent, is limited to those points of law which are raised by the record, considered by the court, and necessary to the determination of the case.

This is a very fundamental principle in the theory of judicial precedents, and has been repeatedly recognized and asserted by the courts, as well as by theoretical writers.[98]

[96] Oakley v. Aspinwall, 13 N. Y. 507.
[97] In re Hill's Estate, 6 Wash. 285, 33 Pac. 585.
[98] Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921; Cohens v. Vir-

"A law or rule of law made by judicial decisions," says Austin, "exists nowhere in a general or abstract form. It is implicated with the peculiarities of the specific case or cases, to the adjudication or decision of which it was applied by the tribunals; and in order that its import may be correctly ascertained, the circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. The reasons given for each decision must be construed and interpreted according to the facts of the case by which those reasons were elicited, rejecting as of no authority any general propositions which may have been stated by the judge, but were not called for by the facts of the case or necessary to the decision. The reasons when so ascertained must then be abstracted from the detail of circumstances with which in the particular case they have been implicated. Looking at the reasons so interpreted and abstracted, we arrive at a ground or principle of decision, which will apply universally to cases of a class, and which, like a statute law, may serve as a rule of conduct. Without this process of abstraction, no judicial decision can serve as a guide of conduct or can be applied to the solution of subsequent cases. For as every case has features of its own, and as every judicial decision is a decision on a specific case, a judicial decision as a whole, or as considered in concreto, can have no application to another and

ginia, 6 Wheat. 264, 5 L. Ed. 257; In re Johnson's Estate, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; People v. Winkler, 9 Cal. 234; Halbouer v. Cuenin, 45 Colo. 507, 101 Pac. 763; Larzelere v. Starkweather, 38 Mich. 96; Holcomb v. Bonnell, 32 Mich. 6; Grimes v. Bryne, 2 Minn. 89 (Gil. 72); Pass v. McRea, 36 Miss. 148; Wyatt v. State Board of Equalization, 74 N. H. 552, 70 Atl. 387; Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722; Runk v. Thomas, 138 App. Div. 789, 123 N. Y. Supp. 523; Enton v. Coney Island & B. R. Co., 136 App. Div. 800, 121 N. Y. Supp. 793; Moriarty v. City of New York, 132 App. Div. 10, 116 N. Y. Supp. 323; Lester v. Board of Education (Sup.) 119 N. Y. Supp. 887; American Nat. Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Revell v. Hussey, 2 Ball & B. 286; Hogan v. Board of Education of City of New York, 200 N. Y. 370, 93 N. E. 951; Hamill v. Samuels (Tex.) 133 S. W. 419.

therefore a different case." [99] To much the same effect is the following oft-quoted remark of Chief Justice Marshall: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other

[99] 2 Austin, Jurisprudence (Campbell's Ed.) § 900. At the risk of some tediousness, we think it desirable to quote further on this point from this acute though eccentric writer: "The primary index to the intention with which a statute was made, or the primary guide for the interpretation of a statute, is the literal and grammatical sense of the words in which it is expressed. But the primary index to the rule created by a judicial decision is not the grammatical sense of the very words or terms in which the judicial decision was pronounced by the legislating judge; still less is it the grammatical sense of the very words or terms in which the legislating judge uttered his general propositions. As taken apart or by themselves, and as taken with their literal meaning, the terms of his entire decision, and, a fortiori, the terms of his general propositions, are scarcely a clue to the rule which his decision implies. In order to an induction of the rule which his decision implies, their literal meaning should be modified by the other indices to the rule, from the very commencement of the process. From the very beginning of our endeavor to extricate the implicated rule, we should construe or interpret the terms of his entire decision and discourse by the nature of the case which he decided, and we should construe or interpret the terms of his general or abstract propositions by the various specific peculiarities which the decision of the case must comprise. For it is likely that the terms of his decision were not very scrupulously measured, or were far less carefully measured than those of a statute; in so much that the reasons for his decision, which their literal meaning may indicate, probably tally imperfectly with the reasons upon which it was founded. And his general propositions are impertinent, and ought to have no authority, unless they be imported necessarily, and therefore were provoked naturally, by his judicial decision of the very case before him. It is even unnecessary that the general grounds should be expressed by the judge. In which case, the only index is the specialties of the decision as construed by or receiving light from the nature of the case decided, an inference ex rei natura." Id. §§ 903–905.

principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." [100] A still more specific and detailed exposition of this principle is given by the court in Tennessee, in the following terms: "It may not be out of place here to remark, as the subject seems to be so often and by so many misunderstood, that the generality of the language used in an opinion is always to be restricted to the case before the court, and it is only authority to that extent. The reasoning, illustrations, or references, contained in the opinion of the court, are not authority, not precedent, but only the points in judgment arising in the particular case before the court. The reason of this is manifest. The members of a court may often agree in a decision—the final result in a case—but differ widely as to the reasons and principles conducting their minds to the same conclusion. It is then the conclusion only, and not the process by which it is reached, which is the opinion of the court and authority in other cases. The law is thus far settled, but no farther. The reasoning adopted, the analogies and illustrations presented, in real or supposed cases, in an opinion, may be used as argument in other cases, but not as authority. In these the whole court may concur or they may not. So of the principle concurred in and laid down as governing the point in judgment, so far as it goes, or seems to go, beyond the case under consideration. If this were not so, the writer of an opinion would be under the necessity in each case, though his mind is concentrated upon the case in hand and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations, and qualifications which every variety of facts and change of phase in cases might render necessary." [101] "When a proposition is laid down general-

[100] Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257. And see Holcomb v. Bonnell, 32 Mich. 6; Pass v. McRea, 36 Miss. 143, 148; Miller v. Marigny, 10 La. Ann. 338.

[101] Louisville & N. R. Co. v. Davidson County Court, 1 Sneed, 637, 695, 62 Am. Dec. 424.

ly," says Ram, "and is meant to be a general proposition applicable to a variety of cases, it is important nevertheless to bear in mind that though, as a general proposition, it may be right, yet there may be circumstances, which may constitute a case in which the rule may not be capable of being applied." [102] It is also a part, or an example, of this general rule that where the principles of a decision of an appellate court appear to be opposed to the letter of the decision, the literal interpretation ought not to be relied on as a binding precedent, because it is the principle actually applied to the decision of the case, and not the court's exposition of the principle, which makes the precedent.[103]

OPINIONS AND SYLLABI

12. Unless the constitution expressly so provides, the superior courts are not obliged, and cannot be required by the legislature, to file written opinions in cases adjudged by them, where they deem it unnecessary or inexpedient. If no opinion is filed, the decision may still be authoritative as a precedent in similar cases, and in that case the decision is to be ascertained from the facts in the case and the order of the court for the final disposition of it.

13. If a written opinion is filed, it generally embodies both the decision of the court and the reasons for it, but it is not necessarily coextensive with the decision. It is evidence of the decision and also of the principles actuating it; but the authority of the case as a precedent is limited to the particular rule or principle of law applied to the facts and forming the basis of the judgment of the court.

14. The syllabus or headnote to a reported case is an epitome of the point or points decided, for the convenience of the reader, but it is no part of the decision, and whether it is prepared by the court itself, or

[102] Ram, Legal Judgment, 99.
[103] Lewis v. Thornton, 6 Munf. (Va.) 87.

by an official or unofficial reporter, it has no power either to enlarge or restrict the scope of the decision or the authority of the case as a precedent.

Constitutional Provisions as to Opinions

In several of the states the constitutions expressly require the court of last resort to file written opinions in the cases which it decides, as, by providing that "every point made and distinctly stated in the case, and fairly arising on the record on appeal, shall be considered and decided, and the reason thereof stated in writing." Some of the supreme courts, in states where this provision is found, consider themselves absolutely bound to obey the organic law in this particular, nothing being left to their discretion.[104] But in other states, the opinion prevails that such a clause in the constitution is merely directory and not mandatory,[105] and that while the supreme court should endeavor to comply with the direction of the constitution, it is not imperatively bound to do so in cases where it deems the particular case to be without novelty or interest and the filing of an opinion unnecessary,[106] and in all, the tendency is to apply to such a constitutional provision that interpretation which will best avoid the inconveniences likely to result from its literal observance, and free the court from the useless labor of multiplying opinions which are of no general value.[107]

Legislative Requirements

The courts of last resort, with practical unanimity, have declared that it is not within the rightful authority of the legislature to require them to state in writing the reasons for their decisions, or to file written opinions. A statute so

[104] State ex rel. Arnold v. Mitchell, 55 Wash. 513, 104 Pac. 791.

[105] Willets v. Ridgway, 9 Ind. 367; McCall's Ferry Power Co. v. Price, 108 Md. 96, 69 Atl. 832; Horner v. Amick, 64 W. Va. 172, 61 S. E. 40.

[106] State v. Donaldson, 35 Utah, 96, 99 Pac. 447, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

[107] Baker v. Kerr, 13 Iowa, 384; Hand v. Taylor, 4 Ind. 409; Craig v. Bennett, 158 Ind. 9, 62 N. E. 273; Bowen v. Stewart, 128 Ind. 507, 26 N. E. 168; Garrett v. Weinberg, 59 S. C. 162, 37 S. E. 51.

providing, if not unconstitutional and void, as an unwarranted encroachment upon the separate powers and functions of the judicial department of government, is at least held to be merely directory, and not binding on the court in any case where its own judgment does not dictate a compliance.[108] Hence, despite such a legislative requirement, a supreme court will generally omit to hand down a written opinion when, in its judgment, the case presents no features of general interest or importance, involves no new questions, or when an opinion would be merely a repetition of those pronounced in former cases.[109] So also, the court is not obliged to deliver a written opinion when the judgment below is affirmed merely because of an equal division in the appellate court.[110] And even if such a statute were to be regarded as mandatory, still it would be strictly construed. Thus, in Kansas, the law does not explicitly require that the reasons for rulings on motions and interlocutory proceedings shall be written out and filed; and hence the right to determine whether such rulings are of sufficient interest or importance to justify opinions setting forth the views of the court is reserved to the court.[111] Also, if the law makes no provision for an opinion in writing by the judge of the trial court (as is generally the case), it is entirely optional with him whether he will write out his conclusions or not, and after he has reduced them to writing, to decide whether he will file the paper or not and at what time.[112]

[108] Vaughn v. Harp, 49 Ark. 160, 4 S. W. 751; Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565; McQuillan v. Donahue, 49 Cal. 157; United States Exp. Co. v. Meints, 72 Ill. 293; Speight v. People ex rel. County Collector, 87 Ill. 595; Lovelace v. Taylor, 6 Rob. (La.) 92; Wright v. Hooker, 55 Tex. Civ. App. 47, 118 S. W. 765; Parker v. Atlantic C. L. R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827. Compare Merriam v. St. Louis, C. G. & Ft. S. Ry. Co., 126 Mo. 445, 29 S. W. 152.

[109] Baker v. Kerr, 13 Iowa, 384; Anderson v. Connecticut Mut. Life Ins. Co., 55 Kan. 81, 39 Pac. 1038; Metzler v. Wenzel, 6 Kan. App. 921, 49 Pac. 750.

[110] Louisville & N. R. Co. v. Sharp, 91 Ky. 411, 16 S. W. 86.

[111] Farwell v. Laird, 58 Kan. 817, 51 Pac. 284.

[112] Missouri, K. & E. Ry. Co. v. Holschlag, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417.

Judicial Practice

When free from the influence of any constitutional or statutory requirement, directory or otherwise, it is the usual practice of appellate courts to prepare written opinions, setting forth more or less fully the reasons which have led them to render the particular judgment. It is said that every court has the right to give reasons for its official action, and that it is a cardinal principle of Anglo-Saxon jurisprudence that a court shall assign the reasons for the decisions which it renders.[113] But this need not be done, and is generally omitted, where no useful purpose would be served by the filing of an opinion. Thus, where the record in a case presents no proposition of law which has not been settled by repeated decisions, it is the practice of many appellate courts to affirm the judgment of the court below without an opinion.[114] So where the only question in the case is one depending wholly on the weight of the evidence, it is not always considered necessary for the opinion to set forth the facts in full, but only to announce the conclusion of the court on the evidence.[115]

Decision Without Opinion as Precedent

As we have pointed out on an earlier page,[116] it is the decision and not the opinion that makes the precedent. If no opinion is filed, still the judgment in the case is a precedent for the rendition of a like judgment in similar cases. Aside from questions depending solely on the weight of evidence, no decision is ever rendered by an appellate court except in pursuance of some rule or principle of law. This rule or principle may be set forth at length in a written opinion, or it may be tacitly implied therein or assumed, or again, it may be the rule or principle applied to the case by the court of first instance and which is simply approved or adopted by the reviewing court. In the latter case, the judgment below is affirmed, and if the order of affirmance is not accompanied by a written opinion, it amounts to an

[113] Ayres v. United States, 44 Ct. Cl. 48.
[114] Stevens v. State, 56 Neb. 556, 76 N. W. 1055.
[115] Harrell v. Beall, 17 Wall. 590, 21 L. Ed. 692.
[116] See supra, p. 38.

authoritative declaration by the appellate court that the disposition made of the case in the court below was legally correct, which is tantamount to saying that all cases presenting the same questions of law, arising out of facts substantially identical, should for the future be decided in the same way. But a decision of this kind, as a precedent, must be very carefully restricted to the exact particulars of the case in which it is given. A high federal court has declared that a per curiam affirmance of a decree on appeal, reciting that "we find no error in the disposition of this case in the circuit court, and the judgment is therefore affirmed," means only that the decree on the facts proved in the record is correct, and nothing else is affirmed.[117]

Written Opinion as Evidence of Decision

It cannot be too strongly insisted upon that the distinction between the decision in a case and the opinion of the court is of the utmost importance. A decision is a judgment or decree pronounced by a court in settlement of a controversy submitted to it, while the opinion is a statement put forth by the court in which its decision is announced, and generally, but not always, containing a more or less elaborate exposition of the legal reasons on which the conclusion of the court is based.[118] As expressed by a learned court, an opinion filed by a court on the decision of any question pending before it is not a judgment, and becomes no part of the record, but is merely a statement or discussion of the grounds or principles on which its judgment is based.[119] The opinion, therefore, is of value and

[117] John Deere Plow Co. v. Anderson, 174 Fed. 815, 98 C. C. A. 523.

[118] See, further, as to this distinction, Houston v. Williams, 13 Cal. 27, 73 Am. Dec. 565; Craig v. Bennett, 158 Ind. 9, 62 N. E. 273; Coffey v. Gamble, 117 Iowa, 545, 91 N. W. 813; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 317, 60 L. R. A. 33; Board of Education of City of Emporia v. State, 7 Kan. App. 620, 52 Pac. 466.

[119] Gage v. Busse, 7 Ill. App. 433. For the doctrine in Nebraska concerning the opinions of the Supreme Court Commissioners, and the value and authority as precedents of those designated as "unofficial" or "official," as the case may be, see Flint v. Chaloupka, 72 Neb. 34, 99 N. W. 825, 117 Am. St. Rep. 771; Lancaster County

importance only as considered in connection with the decision. If there was no decision, an opinion would be extrajudicial and no authority. Thus, the opinion of a judge on the issues of fact in a trial before him which did not result in a judgment is not admissible in evidence on a second trial before another judge.[120] So again, though the opinion is evidence of the decision, yet the several judges of the court other than the writer of the opinion are responsible only for the final result, that is, the decision, not for everything that may be contained in the opinion.[121] Again, the opinion is not necessarily coextensive with the decision. The decision may be correctly founded upon a consideration of every pertinent fact in the case and the correct application of sound legal principles, but this may not appear fully in the opinion. According to the court in California, it is to be presumed that all the facts in a record, bearing on the points decided, have received due consideration by the supreme court, whether all of those facts, or part of them, or none at all, are mentioned in the opinion.[122] So it has been pointed out by the court of last resort in another state that an omission in an opinion filed by it does not operate as a limitation upon the scope of its decree, where that was subsequent in point of time, and might embrace matters not discussed in the opinion, the decree being controlling.[123]

Syllabi

A syllabus is a headnote or memorandum prefixed to the report of an adjudged case, containing an epitome or brief statement of the rulings of the court upon the point or points decided in the case. Formerly, these were often cast in the form of a purely abstract rule of law. But the modern and much more satisfactory practice is to include in

v. McDonald, 73 Neb. 453, 103 N. W. 78; Hoagland v. Stewart, 71 Neb. 102, 100 N. W. 133; Williams v. Miles, 68 Neb. 463, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431.

[120] Eckerson v. Archer, 10 App. Div. 344, 41 N. Y. Supp. 802.

[121] State ex rel. Harrison v. Menaugh, 151 Ind. 260, 51 N. E. 357, 43 L. R. A. 418.

[122] Mulford v. Estudillo, 32 Cal. 131.

[123] Richardson v. Marshall County, 100 Tenn. 346, 45 S. W. 440.

the syllabus a very condensed statement of the essential and determinative facts in the case, so as to show precisely the question of law which arose and the manner of its determination by the court. The syllabus is no part of the decision, and is not to be taken as an expression of the law of the case except in so far as it corresponds with the actual judgment of the court upon the facts in the case.[124] In other words, it cannot either enlarge or contract the scope of the decision or the authority of the case as a precedent. This would be too obvious to deserve remark, were it not for the fact that, in some of the states, the syllabi to the decisions of the courts of last resort are prepared by the judges who write the opinions. Statutes imposing this duty upon the judges of the highest courts have been resisted and condemned as unconstitutional in some states.[125] But in others, either from preference or by acquiescence in the will of the legislature, the task is habitually performed by the judges, and these official syllabi must be considered as a part of the opinion, at least in so far as they serve either to summarize or to explain it. But just as the opinion in a case does not control the decision, but vice versa, so also an official syllabus does not control the opinion, but is to be read in connection with it, and is authoritative only in so far as it correctly summarizes the actual decision of the court. Thus, a clause in an official syllabus not corresponding to anything contained in the opinion, but evidently injected into the syllabus by inadvertence, is to be treated as obiter dictum.[126] The Supreme Court of West Virginia has been at pains to explain its practice in this regard and the use and authority of its syllabi, particularly for the

[124] Denham v. Holeman, 26 Ga. 182, 71 Am. Dec. 198.

[125] Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107; In re Headnotes, 43 Mich. 641, 8 N. W. 552. In West Virginia, in cases in which only questions of fact dependent on evidence are involved, no syllabus of law is necessary or made by the court. Feamster v. Feamster, 51 W. Va. 506, 41 S. E. 910; Koonce v. Doolittle, 48 W. Va. 592, 37 S. E. 644.

[126] Wilson v. Ulysses Township, 72 Neb. 807, 101 N. W. 986. This is here stated as a general rule. There may be some local variations in the theory or practice of the courts.

guidance of the inferior courts, as follows: The syllabus is never made up of findings of facts, but is limited to points of law determined. Sometimes the findings of facts are referred to for the purpose of explaining the point of law adjudicated, and only for such purpose. The opinion, and not the syllabus, shows the findings of fact necessary to the adjudication, for the information of the circuit court; and this court only makes the more important points of law a part of the syllabus for the general information of the legal profession and the public, and not for the government of the circuit court in the further progress of the case. The opinion furnishes it the rule for its further action. If that be doubtful, and the syllabus does not clear away the doubt, the judge below is justified in independent action; otherwise, it must be obeyed.[127]

IDENTITY OR PARALLELISM OF FACTS; DISTINGUISHING CASES

15. In order that the decision in one case should be a precedent for the decision of another case, it is not necessary that the facts in the two cases should be absolutely identical; it is sufficient if they are substantially the same, without material difference. But there is a material difference, derogating from the authority of the former case as a precedent, if that case contained facts or circumstances, essentially a part of the issue and directly influencing the judgment, which are not present in the second case, or if the second case contains facts or circumstances, likewise essential to be considered in its determination, which were not present in the first case, but which, if present, would have modified or changed the judgment therein.

[127] Koonce v. Doolittle, 48 W. Va. 592, 37 S. E. 644. Compare Evans v. Moore, 28 Ohio Cir. Ct. R. 1, as to the attitude of a subordinate court towards the authority of a decision of the court of review in which no syllabus was prepared.

Two cases or decisions which are alike in all material respects, and precisely similar in all the circumstances affecting their determination, are said to be or to run "on all fours" with each other, or, in the more ancient language of the law, the one is said to "run upon four feet" with the other. A previous decision on all fours with the case to be tried or argued is of course a precedent which is directly applicable, though it does not follow that it is intrinsically entitled to as much weight or authority as another decision which, without presenting such a striking similarity of facts, yet rests upon the same rule or principle of law, and is perhaps much better supported by sound legal reason and the weight of authority.

But in order that the decision in one case should be available as a precedent for the decision of another case, it is not necessary that the circumstances of the two cases should be absolutely identical. Indeed, this very seldom occurs in practice. Each case actually in the courts involves numerous facts or circumstances which may never be present in any other. But many of them may be immaterial to the rule of law announced in the case and which governed its decision. If the point of difference between the two cases is such that its presence or absence could make no difference in the determination of the rule of law by which the case is to be governed, it is immaterial, and will not affect the authority of the former case as a precedent in the latter. But if there be a fact or circumstance in the former case which is not present in the latter case, and which is of such a nature that the former case could not have been ruled as it was had that fact or circumstance been absent, or, conversely, if the second case is of wider scope than the first and contains a fact or circumstance, of such a nature as to have a material bearing upon its determination, which was not present in the first case, then the earlier case is not an authority for the decision of the later.[128] The ascertainment of such material points of difference, and the indication of their influence upon the decision to be ren-

[128] See Lyons v. Woods, 5 N. M. 327, 21 Pac. 346; O'Brien v. City of New York, 57 Misc. Rep. 639, 108 N. Y. Supp. 611.

dered, is known as "distinguishing" cases. We may illustrate this process by a ancient but instructive case, in which the action was for damages for killing the plaintiff's dog, which was chasing a hare in the defendant's close. The cases cited to the court were also actions of trespass for killing trespassing dogs, but in one the animal was chasing a cony in a warren, and in the other a deer in a park. On the argument of the case it was remarked from the bench: "To make these cases bear upon the present, you must assimilate the hare to rabbits in a warren or deer in a park, which are the subjects of property," while, at that time at least, a hare running at large was not.[129] This was therefore the distinguishing feature of the earlier cases which was absent from the later case. To take a more modern illustration, a decision that banks which accept the provisions of a certain tax law thereby acquire an irrevocable right to exemption from all other forms of taxation than that provided in the act, is not a conclusive authority for the proposition that trust companies, having no generai banking powers, acquire a similar exemption by a like acceptance.[130]

The process of distinguishing cases is a legitimate and even a necessary part of the right application of the doctrine of precedents. It is only by this means that the value and importance of earlier decisions can be exactly appraised and certainty and precision be given to the principles of law announced from the bench. But carried to an extreme, it becomes a mere splitting of hairs. On the part of counsel, it is resorted to as a means of evading the effect of an unfavorable precedent by fine-drawn subtilties, and courts have been known to resort to the same process for the purpose of escaping from the control of an earlier decision which they regret but do not venture directly to overrule. When thus employed, the doctrine is dangerous and even harmful. "The value of judicial opinions as a standard of authority," says the court in West Virginia, "is much en-

[129] Vere v. Cawdor, 11 East, 568. See 2 Bl. Comm. 392.

[130] Fidelity Trust & Safety Vault Co. v. City of Louisville, 174 U. S. 429, 19 Sup. Ct. 875, 43 L. Ed. 1034.

hanced by uniformity of decision, and it is always inexpedient to fritter away firmly-established principles by subtle refinements and hypercritical distinctions."[131] So also, according to the Supreme Court of Vermont, "all courts ought to fasten more upon the general current of the authorities, and the principle evolved from all the cases, so to speak, than upon the peculiar facts of any particular case."[132] Finally, it is to be observed that, when a decision is cited as a precedent in another jurisdiction, its value is to be determined by reference, not only to the identity of the facts with those in question, but also to identity of the principle upon which the decision is based with the pertinent rules established in the jurisdiction in which the controversy is pending.[133]

ARGUING FROM ANALOGY; COMBINING CASES

16. In the absence of any direct precedent, it is proper to argue from analogy, and to apply to the solution of the case at bar principles of law extracted from analogous, but not identical, cases, and which naturally and logically lead up to a given conclusion.

17. But analogical reasoning has not the force of deduction; and great care must be exercised that the analogy shall be close and perfect and that it shall not be destroyed by the intervention of modifying circumstances bringing the case under a different rule or principle of law.

18. By combining various decisions, all dealing with the same general topic, though with dissimilar aspects of it, and by a process of generalization from them, a general rule or principle may be established which is broader than the doctrine of any one of the cases taken by itself, and broad enough to include a novel case to which it is to be applied.

131 Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. 17.

132 Claflin v. Wilcox, 18 Vt. 610.

133 Anderson v. Pittsburg Coal Co., 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624.

Decision Upon Analogy

The argument from analogy makes a precedent of a former decision where the facts were not identical with those involved in the case at bar, and yet legally like them. If the circumstances of the former case were materially different, and yet the decision was based on a principle of law which is equally applicable to the case at bar, because evolved from or supported by legal reasons which have as much force in the one case as in the other, then it may constitute a precedent. That this course of argument is proper in the absence of a direct precedent is attested by all the authorities.[184] Thus, in one case it was said: "No case hitherto has been before this court involving the precise question now under consideration, but analogous questions have been discussed in several cases, and principles applied to them which naturally and logically lead to the result we have reached in this case."[185] In another: "We have found no case exactly in point, but we have found many analogous cases, which, in principle, sustain the by-law before us."[186] In another: "While I frankly admit that I am able to find no case where the above principles have been applied to circumstances exactly like those of the case at bar, yet I am unable to distinguish it in principle from those in which it has often been applied."[187] "We wish to remark in conclusion that we have found no case which is in all respects exactly like the present one, both on the facts and the language of the statute; but in all the cases without exception we find announced certain principles, founded, as we think, in reason and justice, which seem to lead up logically and irresistibly to the conclusions at which we have arrived."[188]

[184] See, for example, Rennell v. Bishop of Lincoln, 7 Barn. & C. 113, 168; Morris v. Clarkson, 3 Swanst. 561.

[185] Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94.

[186] Western Union Tel. Co. v. McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296.

[187] State v. Republican Valley R. Co., 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424.

[188] State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313.

To illustrate the principle and the process of arguing from legal analogy, we may cite a case in Massachusetts where, after showing that judges are not liable to actions for damages for acts done by them in their judicial capacity, the court continued: "A similar immunity extends to jurors. The question whether a like immunity extends to arbitrators seems never to have arisen in this commonwealth. An arbitrator is a quasi-judicial officer, under our laws exercising judicial functions. There is as much reason for protecting and insuring his impartiality, independence, and freedom from undue influence, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him." [139] So, in a case in a federal court, the question was whether, in a suit against a collector of customs, a merchant appraiser should be permitted to testify in contradiction of the report which he had made to the collector. It was said: "We have been referred to no case, and are quite confident that none can be found, where this precise question has been decided. The weight of authority upon analogous questions, however, having reference to jurors, referees, arbitrators, and commissioners, sustains the position here taken. Every objection to them [to their being permitted to testify] applies with equal or greater force to an appraiser." [140] A still more striking example of the use of the argument from analogy, as well as of its proper limitations, is found in a case in New Jersey, in which an application was made to compel the defendant, a stock-yards company, to receive live-stock carried over the complainant railroad company's line and offered to be delivered to it. In the course of the opinion by Vice Chancellor Van Fleet, it was said: "The defendants' business is of recent origin. Their duties and liabilities are wholly undefined, except as they may be deduced from the application of well-established legal principles to other corporations in analogous cases. No case was cited on the argument, and none is

[139] Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 50 Am. Rep. 323.

[140] Oelberman v. Merritt (C. C.) 19 Fed. 408.

known to exist, in which the duties of a body corporate like the defendants have been the subject of judicial consideration. The business of the defendants has no exact counterpart or model in any of the established instruments of commerce or agencies used by the public in the transaction of business. It bears a closer resemblance to the business carried on by warehousemen than to any other business known to the law. Except in the character of the property which is the subject of bailment, the business of the defendants corresponds, in many respects, with that of the warehouseman. That is the only business which can, in my judgment, be safely used, by way of analogy, for the purpose of ascertaining whether or not, according to the established principles of general law, the defendants are subject to the duty which the complainants ask the court to compel them to perform. There can be no doubt, I think, that a warehouseman is not required, by any general rule of law, to receive goods on storage against his will. * * * The discussion thus far has demonstrated, I think, that even if we were at liberty, in deciding a question of strict legal right, against a new instrument of business, to enter the field of analogy, and if there was found there a somewhat similar instrument to the one in question which had been held to be subject to certain duties, to charge the new instrument with the same duties, on the ground of its similarity to the other, that no such duty as that which complainants claim could, by force of any general rule of law, be held to rest upon the defendants. The only other means by which the duty in question could have been created is by statute." [141]

Caution in Use of Legal Analogies

The argument from analogy fails altogether unless the analogy is close, true, and perfect, or unless the same reasons, of law or logic, which support the principle of law applied in the one case would equally support it in the other. Hence, as stated above, it is necessary in using this

[141] Delaware, L. & W. R. Co. v. Central Stock-Yard & Transit Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855.

process to exercise great care lest the argument should be destroyed by the intervention of material circumstances, modifying the case, and bringing it under the application of a different rule of law. Thus, in one of the English cases, Chief Justice Best remarked that, in the absence of any direct precedent for the decision of the point in question, he had endeavored to find other cases from which he could safely reason by analogy. But he added this word of caution: "In all sciences, analogical reasoning must be pursued with great caution. Minute differences in the circumstances of two cases will prevent any argument from being deduced from one to the other." [142]

Arguing from False Analogy; Misuse of Precedents

In cases of first impression, arising out of new social, commercial, or industrial conditions, it is sometimes a mistake to adhere too closely to the rulings made in earlier cases which are supposed to be more or less analogous to the one in hand. Such precedents may indeed serve to point out the broad general principles of law in accordance with which the new case should be decided. But to follow them too implicitly may introduce serious error into the law and lay the foundation for future trouble. It should not be forgotten that both the strength and the justice of our case-made law depend very largely on its constant and ready adaptation to the changing needs and habits of the people. To carry forward the rules of law which governed the dealings of an earlier generation, and apply them, in all their strictness and without modification, to a new world, where multitudinous business transactions are carried forward in ways and by agencies before unknown, is to make the law reactionary and obstructive, instead of progressive. Hence an earlier decision should not be relied on and followed in a novel case, merely on the analogy of its circumstances to those now involved, unless the analogy is substantial, perfect, and complete.

This principle is illustrated by the conflicting decisions which were made when the question of the liability of tele-

[142] Rennell v. Bishop of Lincoln, 3 Bing. 265.

graph companies for negligence in the transmission of messages or for failure to deliver them first began to come before the courts. The Supreme Court of Florida has pointed out, in a well-considered opinion filed in 1886, that the courts of last resort in seven states had held that only nominal damages could be recovered, unless the sender of the telegram had informed the operator of the special circumstances which constituted the importance of the message and the need of its correct and prompt transmission. In so holding, they all followed the case of Hadley v. Baxendale, 9 Exch. 341, which was an action of damages against a common carrier for delay in the transportation of a piece of machinery. "All the cases above referred to," says the court in Florida, "rely upon the authority of this case of Hadley v. Baxendale, and are decided upon the theory that the principles of law regulating the conduct of common carriers apply equally to the transmission of messages by the electric telegraph system. The business of one is to transport from one locality to another some tangible object of weight and dimension. Experience does not suggest, in such a transaction, any other liability than compensation for its value if lost or destroyed in the transportation, or such damages for its delay as the object itself might suggest. The business of the other is the transmission from one person to another, and from one locality to another, of information or intelligence,—nothing in itself, but as the basis and groundwork that is to influence the conduct of others, it is in this respect of the very first importance. One is limited to the transportation of tangible things; the other, to the transmission of the intangible. There is no similarity in the services to be performed, in the nature of the things to be transported or transmitted, or the purposes to be effected, and, as a consequence, none in the measure of damages for failure to perform their respective agreements. * * * The common carrier charges different rates of freight for different articles, according to their bulk and value and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale

of prices which were higher or lower as the importance of the dispatch was great or small. It cannot be said then, that for this reason the operator should be informed of its importance, when it made no difference in the charge for transmission. It is not shown that if its importance had been disclosed to the operator, he was required, by the rules of the company, to send the message out of the order in which it came to the office with reference to other messages awaiting transmission; that he was to use any extra degree of skill, and different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded, for sending an unimportant dispatch, or that it would aid the operator in its transmission. * * * The system of telegraphy * * * having for its mission the almost instantaneous communication of ideas between persons widely separated as to distance, unlike any industry or enterprise that had ever been in use before, may justly be considered and treated as standing alone, a system unto itself. * * * Any attempt to apply to such a novel system legal principles adapted to pursuits and occupations which are dissimilar in their nature, and designed for the accomplishment of different purposes, must naturally result in failure and confusion. A recognition by the courts of this truth, and an application from time to time, to its conduct, of such rules and regulations as common sense may suggest as fitted to its peculiar nature and purposes, without reference to systems that are not similar, and principles that are not analogous, is the only method of preserving the law regulating its operation from contradictions and perplexities. Similar difficulties have previously arisen in other branches of the law, when from their novelty, and a failure of applicable precedents, the courts, probably from fear of the hazard of framing new rules, or misled by a seeming analogy, have attempted to apply to such legal novelties long-used principles of law, and to analogize the new to some old system with which they were familiar." [148] Another instance of the effect of reasoning from

[148] Western Union Tel. Co. v. Hyer Bros., 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222. But note that a stipulation by a telegraph

a false analogy is pointed out by the Supreme Court of Pennsylvania, in a case in which the question was as to the apportionment of interest on municipal and corporation bonds between a remainder-man and the representatives of the life tenant. The court was strongly pressed with the authority of a previous decision in which the English rule was applied to American securities of the kind mentioned. But the court denied the applicability of this rule, and pointed out that there was no true analogy between the funded public debt of Great Britain and the bonds of American cities or public-service corporations, inasmuch as the reason which forbids the apportionment of interest in the one case (that the interest does not accrue from day to day) has no existence in the other. Speaking of the decision criticised, it was said: "The decision of so eminent a jurist as Judge King is entitled to much respect, but it is not authority beyond its reason. It is manifest from a careful study of Judge King's opinion that he did not consider, and probably entirely overlooked, the peculiar character of the English consols and their marked difference from the public debt of this country." [144]

Combining Cases; Generalization of Rules

It frequently happens that a case may be decided strictly on precedent, although no earlier case can be found which is on all fours with it or even a direct precedent for it. For several cases, all dealing with the same general topic, although with dissimilar aspects of it, may, by their combination, establish a general rule which is broader than the doctrine of any one of the cases taken by itself, and broad enough to include the novel case to which it is to be applied.[145] Let it be supposed, for example, that it has been

company, incorporated into its blank forms for messages, excusing it from all liability for mistakes in the transmission of messages, unless they are repeated, is reasonable and valid. Lassiter v. Western Union Tel. Co., 89 N. C. 334.

[144] Wilson's Appeal, 108 Pa. 344, 56 Am. Rep. 214.

[145] As an example of the process of combining cases and obtaining from them, by a process of generalization, a doctrine wider than the facts of any one case, see the following remarks of the Master of the Rolls (Brett) in Heaven v. Pender, 49 Law T. N. S. 357:

decided that an inscription painted on glass is admissible as documentary evidence in a proper case, notwithstanding the nature of the substance and the method of putting the writing upon it. Suppose further that a second case has made a similar decision with regard to an inscription cut into wood, and that a third case has laid down the same rule with reference to an inscription carved on stone. A case now arises in which the question is as to the admissibility of an inscription engraved on a gem or a ring. No one of the three previous cases is identical with it. Yet those cases, taken together, may be considered as having settled the general rule that neither the substance on which a document is inscribed nor the manner of the inscription is material, so long as it is legible and sufficiently enduring in character. And this general rule is broad enough to include the case on trial and to furnish a principle for its decision.[146] But this process of generalization, to produce right results, must be careful and exact. "The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by

"The logic of inductive reasoning requires that, where two major propositions lead to exactly similar minor premises, there must be a more remote and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in cases of collision and of carriage. The proposition which these recognized cases suggest, and which is therefore to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions, to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognized cases of liability. It is the only proposition which covers them all. It may therefore safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case."

[146] See 1 Wharton, Evidence, §§ 219, 220, 614.

elimination of all the qualifying circumstances, is a very peculiar and difficult one. The opinion of the judge, apart from the decision, though not exactly disregarded, is considered as extra-judicial, and its authority may be got rid of by any suggestion which can separate it from the actual result. Unless, therefore, a proposition of law is absolutely necessary to a decision, however emphatically it may have been stated, it passes from the province of 'auctoritas' into that of mere 'literatura.' Curiously enough, it is not the opinion of the judge, but the result to the suitor, which makes the law." [147]

LEGISLATIVE AND EXECUTIVE CONSTRUCTIONS AND DECISIONS OF SPECIAL TRIBUNALS AND QUASI-JUDICIAL BODIES

19. A legislative construction of a constitution, statute, or treaty, while it cannot control the judgment of the courts and is not a direct precedent, is entitled to great weight and consideration in doubtful cases; and the same is true of a practical construction put upon the laws by the executive or administrative officers who are charged with their enforcement.

20. Decisions of special tribunals and quasi-judicial bodies, such as the United States land office, and the courts or judicatories of religious societies, while devoid of imperative force as precedents in the civil courts, are received with much respect and allowed strong influence, as emanating from persons peculiarly well qualified to decide correctly upon matters within their special jurisdiction.

Political Questions

Questions which are of a purely political nature are not the subject of judicial cognizance; courts will leave the determination of them to the executive and legislative de-

[147] Markby, Elements of Law, p. 63.

partments of the government; and in so far as a question of this kind may be necessarily involved in a case before a court, if it has been settled by the action of the political departments of the government, the judiciary will accept and follow their conclusions without question, not, indeed, because such a determination is a precedent in any proper sense of the word, but because it does not belong to the courts to re-examine it.[148]

Legislative and Executive Constructions

A construction put upon a statute by the legislature itself, by a subsequent act or resolution, is not "authentic," in the sense of the civil law, so as to impose upon the courts an absolute duty to accept and follow it. Neither is it a precedent, in the proper sense of the term, as the legislature is not a judicial body. But yet in a case of substantial doubt or real ambiguity as to the meaning of the law, such a construction will be entitled to serious consideration and to a legitimate influence over the mind of the court, and should not be departed from unless clearly wrong.[149]

On a similar principle, where one of the great departments of the executive branch of government, or its head, or a chief officer of state, or generally any executive or administrative officer of high and responsible rank, has placed a practical construction upon a statute or treaty for the purpose of its practical administration, this is to be regarded as strong evidence of the true meaning of the law, and the courts will not interpret the law differently

[148] Marbury v. Madison, 1 Cranch, 137, 170, 2 L. Ed. 60; Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721; United States v. Anderson, 9 Wall. 56, 19 L. Ed. 615; In re Grossmeyer, 4 Ct. Cl. 1; United States v. Holt (C. C.) 168 Fed. 141; Parker v. State ex rel. Powell, 133 Ind. 178, 32 N. E. 836, 18 L. R. A. 567; Black, Const. Law (3d Ed.) 100.

[149] Black, Interp. Laws (2d Ed.) p. 306, where the cases are collected. And see Hedgecock v. Davis, 64 N. C. 650; Ross v. Board of Sup'rs of Outagamie County, 12 Wis. 26; Com. v. Miller, 5 Dana (Ky.) 320; Philadelphia & E. R. Co. v. Catawissa R. Co., 53 Pa. 20, 60.

unless there are weighty reasons for so doing.[150] Yet such a practical construction is not a judicial determination, and it does not make a precedent, or in any way preclude the independent judgment of the courts. Hence no executive or administrative interpretation of the law can be allowed to defeat its plain meaning and purpose as the courts understand them; and if such an interpretation is plainly erroneous, it is the duty of the courts to disregard it.[151]

Decisions of General Land Office

The rulings and decisions of the land department of the United States government (including in that term the secretary of the interior, the commissioner of the land office, and the registers and receivers), upon questions of fact presented for their determination, in cases within their jurisdiction in the official business of the land office, and in the absence of fraud or misrepresentation, are final and conclusive, and cannot be reviewed or re-examined by the courts.[152] But their decisions upon questions of law, or upon the construction and application of the land laws of the United States, are not binding upon the courts, in the character of precedents, when similar questions arise in the course of litigation, although it is entirely proper that they should be referred to, and that they should be treated with great deference, as being expert opinions upon a peculiar and highly specialized system of legislation,[153] especially when the question in hand is new and

[150] Stuart v. Laird, 1 Cranch, 299, 2 L. Ed. 115; United States v. Gilmore, 8 Wall. 330, 19 L. Ed. 396; Brown v. United States, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; United States v. Wotten (C. C.) 50 Fed. 693. And see Black, Interp. Laws (2d Ed.) p. 300.

[151] United States v. Tanner, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321; United States v. Bashaw, 50 Fed. 749, 1 C. C. A. 653; Wilson v. Wall, 34 Ala. 288; Goldsborough v. United States. Taney, 80, Fed. Cas. No. 5,519; Reid v. People, 29 Colo. 333, 68 Pac. 228, 93 Am. St. Rep. 69; Lownsdale v. City of Portland, 1 Or. 381, Fed. Cas. No. 8,578.

[152] 2 Black, Judgm. § 530.

[153] Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Johnson v. Bridal Veil Lumbering Co., 24 Or.

has not been made the subject of any direct adjudication by the courts.[154]

Courts and Ruling Bodies of Religious Societies

The decisions of the courts and governing bodies of the various churches or religious societies, on matters relating to the ecclesiastical organization, membership, discipline, and doctrine and worship of the particular church, while not absolutely binding on the civil courts, are entitled to very great weight as precedents.[155] Indeed, the court in New Jersey has declared that "with respect to spiritual matters and the administration of the spiritual and temporal affairs of the church, not affecting the civil rights of individuals or the property of the corporation, the ecclesiastical courts and governing bodies of the religious society have exclusive jurisdiction and their decisions are final."[156] Thus, for example, "while it is fully true that courts of law will not enter into the examination or discussion of purely theological questions in order to ascertain the proper beneficiary of a resulting trust, yet it is clear that if the trust was created for the benefit of those adhering to a particular denomination, courts of law will accept and follow the determination of the proper ecclesiastical tribunals as to who are adhering and in subordination to that denomination."[157] So, in a case in Indiana, it was held that, although an association of Baptist churches

182, 33 Pac. 528; Arnold v. Christy, 4 Ariz. 19, 33 Pac. 619; Lownsdale v. City of Portland, 1 Or. 390, Fed. Cas. No. 8,578; Laurendeau v. Fugelli, 1 Wash. 559, 21 Pac. 29; United States v. Union Pac. Ry. Co., 148 U. S. 562, 13 Sup. Ct. 724, 37 L. Ed. 560; United States v. Burkett (D. C.) 150 Fed. 208.

[154] Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20.

[155] Bouldin v. Alexander, 15 Wall. 131, 21 L. Ed. 69; Harrison v. Hoyle, 24 Ohio St. 254; White Lick Quarterly Meeting of Friends, by Hadley, v. White Lick Quarterly Meeting of Friends, by Mendenhall, 89 Ind. 136; Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 138, 49 N. W. 81, 13 L. R. A. 198; Bird v. St. Mark's Church of Waterloo, 62 Iowa, 567, 17 N. W. 747.

[156] Livingston v. Rector, etc., of Trinity Church in Trenton, 45 N. J. Law, 230.

[157] First Constitutional Presbyterian Church v. Congregational Soc., 23 Iowa, 567.

has only advisory powers in matters relating to an individual church, yet where both the factions existing in such a church submit their claims to it, on their own statement and version of the controversy, seeking its recognition, the decision of the association is entitled to very great weight in a court of law called upon to decide which faction is the real and true church. It was pointed out that such decision, proceeding from a body composed of delegates from all the churches in the association, a majority of whom in council have decided the same way, might not be strictly conclusive on the courts, but would be a safer guide for them to follow, on questions of religious doctrine, faith, and practice, than any judgment the courts might form for themselves.[158]

DECISION BY EQUALLY DIVIDED COURT

21. Where the judges of a court of first instance are equally divided in opinion upon the question presented by an objection of any kind or a demurrer, it will be overruled; if they are equally divided upon an application of any kind for affirmative relief, it must be denied.

22. Where the judges of an appellate court are equally divided in opinion, the judgment of the court below will be affirmed; but such an affirmance, while conclusive of the rights of the parties in the particular suit, settles no question of law and does not have the force of a precedent in similar cases in the same or any other court.

Equal Division in Court of First Instance

When the judges composing a trial court are equally divided in opinion as to whether a demurrer should be sustained or not, it must be overruled.[159] In the same cir-

[158] Smith v. Pedigo, 145 Ind. 361, 33 N. E. 777, 19 L. R. A. 433, 32 L. R. A. 838.

[159] Putnam v. Rees, 12 Ohio, 21.

cumstances, a motion for a new trial or in arrest of judgment or for a rehearing will be denied.[160] And if the court is similarly divided upon an objection to evidence, or as to the competency of a witness, the objection does not prevail, and the evidence must be admitted or the witness permitted to testify.[161] So, a verdict will be sustained when the judges are equally divided upon the question of rendering judgment upon it.[162] Nor can an application for relief of any kind be granted unless it commands the assent of a majority of the court. A petition for a writ of habeas corpus must be dismissed if the judges are equally divided in opinion as to the judgment that should be entered.[163] And where a court is composed of two judges, one of whom is in favor of granting a motion made to the court, and the other opposed, the motion must fail; and it is error for one judge to enter a decree for an injunction when the other judge dissents.[164] The cases which form exceptions to this general rule are not numerous nor very important. It has, however, sometimes been held that in case of an equal division among the judges composing a trial court, no final judgment or decree can be entered, but the case must be left open or continued for a new trial.[165] And in some states, where two judges composing a court differ, the preference is given to the opinion of the judge senior in office, who is allowed to overrule the other and pronounce judgment.[166]

Equal Division in Appellate Court

The same general principle applies in the courts above. When the judges of an appellate court are equally divided in opinion as to the disposition to be made of a case before

[160] Ayres v. Bensley, 32 Cal. 632; State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458.

[161] Henry v. Ricketts, 1 Cranch, C. C. 545, Fed. Cas. No. 6,385; State v. Brown, 2 Marv. (Del.) 380, 36 Atl. 458.

[162] State v. Perkins, 53 N. H. 435.

[163] In re Stockman, 56 Mich. 218, 22 N. W. 321.

[164] Madlem's Appeal, 103 Pa. 584.

[165] Northern R. R. v. Concord R. R., 50 N. H. 166; Deglow v. Kruse, 57 Ohio St. 434, 49 N. E. 477; Irons v. Hussey, 3 Ind. 158.

[166] In re State Bank, 57 Minn. 361, 59 N. W. 315.

them, the judgment of the court below will be affirmed. This is sometimes put on the ground of expediency. "The judges simply agree that it is expedient to finish the litigation. It is a public expediency, and it is often expedient also with respect to the interests of the parties. Supported by these considerations, and the presumption of correctness which always attaches to the judgment of the court below, it is proper and right that the judges who were in favor of a reversal should waive any insistence of opinion and unite with their associates in an affirmance of the judgment. This they do without in any way relinquishing their convictions upon the questions of law or fact involved in the case." [167] Perhaps a better foundation for the rule is found in the principle that the party who prosecutes an appeal or writ of error must assume the burden of satisfying the appellate tribunal that the inferior court rendered an erroneous judgment; and unless he induces a majority of the judges to hold this view, he has not made out his case, just as, in parliamentary practice, it is not sufficient for the passage of a bill or resolution that half of the votes cast should be in its favor; it must receive a majority or it is lost. But whatever theories may be regarded as best supporting the rule in question, the important matter for our present purpose is that a judgment of affirmance by an equally divided court is not an authoritative declaration that the rules or principles of law laid down by the court below, or considered by it as determinative of the case, were correct or correctly applied. Such a judgment of affirmance is indeed as binding on the parties to the particular litigation as one rendered by the entire court. But it is not regarded as settling the questions of law involved for the purposes of any other or subsequent suit. It is not to be cited or relied on as a judicial precedent, and does not preclude a fresh examination and decision of the same questions of law in the same court or in any court subject to its judicial authority.[168] But it should be observed that we are here

[167] Luco v. De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543.

[168] Roe v. Galliers, 2 Durn. & E. 133, 140; Hertz v. Woodman, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001; Etting v. Bank

speaking only of an equal division. Though the authority of a decision may be weakened by dissent among the judges, it is not robbed of all force as a precedent except where a judgment of affirmance automatically follows an equal division of opinion among them. And this is not the case where the decision is made by two of the four judges composing the court, the third dissenting and the fourth being absent.[169] Neither does the rule apply where a majority of the judges concur in the result, though differing in their views as to individual features of the case.[170]

As an example of the working of this rule, we may mention a case where the validity of a patent was in litigation in the federal courts in two circuits. In one, it was held valid by the circuit court of appeals; in the other, a contrary judgment was given by the corresponding court. The latter judgment was appealed to the supreme court of the United States, and was there affirmed in consequence of an equal division of the judges. It was held, and rightly, that this did not overcome the effect of the decision in the first-mentioned circuit, which must still be regarded as controlling there.[171]

But although a judgment by an equally divided court settles nothing as a precedent, it may yet raise a serious doubt as to the state of the law, and may therefore properly influence the inferior courts of the same system. Thus, on an appeal from a United States circuit court, the Supreme Court of the United States considered the question of the jurisdiction of the court below, and the judges were equally divided in opinion on this point. Consequently the

of United States, 11 Wheat. 59, 6 L. Ed. 419; Westhus v. Union Trust Co. of St. Louis, 168 Fed. 617, 94 C. C. A. 95; Territory v. Gaines, 11 Ariz. 270, 93 Pac. 281; Luco v. De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543; State ex rel. Hampton v. McClung, 47 Fla. 224, 37 South. 51; City of Kalamazoo v. Crawford, 154 Mich. 58, 117 N. W. 572; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; Bridge v. Johnson, 5 Wend. (N. Y.) 342; People v. Mayor, etc., of City of New York, 25 Wend. (N. Y.) 256, 35 Am. Dec. 669; In re Griel's Estate, 171 Pa. 412, 33 Atl. 375.

[169] Johnson v. Lewis, 1 Rich. Eq. (S. C.) 390.

[170] Losecco v. Gregory, 108 La. 648, 32 South. 985.

[171] Hanifen v. Armitage (C. C.) 117 Fed. 845.

action was ordered to be remanded to the state court from which it had been removed into the circuit court. Afterwards, in a similar case in the district court, it was said: "It is quite impossible, in view of this division of opinion in the supreme court and its consequent action, to say that the jurisdiction of this court over the cases now in question is not a matter of the gravest doubt. The action of the supreme court has thrown the most serious doubt upon our jurisdiction in such cases, and I would not feel justified in practically arresting and setting aside the jurisdiction of the state courts while the judicial power of this court in the matter is a subject of such uncertainty and doubt." The court therefore refused to grant an injunction, the jurisdictional question being as to its power to do so.[172]

Exceptional Instances of Contrary Rule

While the English courts generally affirm or acquiesce in the rule that a judgment of affirmance by an equally divided court has no force as a precedent, yet the House of Lords has established for itself a different rule, holding that one of its decisions, though rendered upon an equal division of the lords voting, is just as binding and conclusive as a precedent as if it had been rendered without any dissent.[173] And this is also the rule in South Carolina as to a judgment of affirmance by the supreme court of that state.[174]

CONSIDERATIONS AFFECTING THE FORCE OF PRECEDENTS

23. Where a prior decision is cited to a court or considered by it, as a reason which should influence it to render a particular judgment, and the decision is not one which the court is imperatively bound to follow, but which it may either approve or reject,

[172] Wagner v. Drake, 31 Fed. 849.

[173] Beamish v. Beamish, 9 H. L. Cas. 274, 338.

[174] City of Florence v. Berry, 62 S. C. 469, 40 S. E. 871; American Mortg. Co. of Scotland v. Woodward, 83 S. C. 521, 65 S. E. 739.

criticism of the decision in respect to matters affecting its force and influence as a precedent is proper and necessary. Thus regarded, not all decided cases possess the same value as authorities or the same weight as precedents. There are various circumstances which may either strengthen or weaken the force of a decision in this aspect. These circumstances are separately considered in the following sections.

If the decision cited to a court is one which it is imperatively bound to follow, no criticism of it as an authority is either proper or permissible. Thus, the inferior courts of a state are absolutely bound to follow an applicable decision of the court of last resort in the state, without any regard to the soundness or fallacy of its reasoning, its learning or want of it, its concurrence with the weight of authority in other states or divergence therefrom, or any other considerations, and without any regard to the judge's opinion as to whether the rule laid down by the court above was "good law" or not. The only inquiry is whether the facts of the case on trial are so far identical with, or similar to, those in the case in which the decision was given as to bring the one within the rule laid down in the other, or whether there are material circumstances which may serve to differentiate or "distinguish" the two cases. But where there is no direct precedent obligatory upon the court, whether it be a higher or a lower court, then the aid of decisions rendered in other jurisdictions may be invoked. And here it is not only proper but necessary to weigh and appraise them carefully. For some may be intrinsically entitled to the very highest respect and influence, while others may be of extremely small worth, or even examples to be shunned. The considerations which may thus add weight and authority to a decision, or may detract from its force, are numerous and important, and will now be separately noted and commented on.

NATURE OF QUESTION DECIDED AND FORM OF PROCEEDING

24. The force of a precedent may be affected to some degree by the nature of the question decided, and, in this connection, its authority may further depend on the court from which it proceeds, as having or lacking special familiarity with questions of that class and experience in their determination.

25. Decisions rendered ex parte or on preliminary or interlocutory proceedings do not possess so much force or value as those given upon contest and argument or pronounced upon the final disposition of a cause.

Decisions on Jurisdiction

It has been said that "precedents in regard to questions of doubted jurisdiction, assumed and decided by the same court whose power is doubted, are of less value than those which occur in the decision of ordinary law cases. The court here forms a party, and the doctrine of stare decisis does not apply with equal force as in a proper law decision on a question of meum and tuum." [175] But it should be remarked that a decision of the court of last resort in the particular system, on the boundaries of its own jurisdiction, while it may be open to re-examination in the same court, is imperatively binding on all the inferior courts of the same system.

Special Knowledge and Experience of Court

The fact that the court rendering a given decision has had long and special familiarity with questions of the same general class, or wide and varied experience in the application of the rules of law governing a certain general subject, will add much to the weight and value of the decision as a precedent. Thus, some state courts of last resort, at various times, have been particularly noted for their sound and consistent decisions on questions of commercial law, of equity jurisprudence, or of the law of real property.

[175] Lieber, Hermeneutics, 203.

Aside from other considerations, this fact will add prestige and authority to such a decision proceeding from such a court. On the other hand, if the decision cited as a precedent involved the solution of a question with which the court that rendered it could not be supposed to be specially familiar, it will not be entitled to so great weight. Or if the case turned upon the construction of a local statute, or some peculiarity of local law, it will not be regarded as of much importance in a jurisdiction where similar conditions do not prevail.

Ex Parte and Interlocutory Decisions

A decision made upon an ex parte application or an uncontested proceeding is not regarded as being entitled to the same weight and authority as one which follows upon a contested suit. The reason is that in the latter case the points involved in the case are thoroughly brought into prominence and before the mind of the court, the questions implicated in the case are argued and discussed, and the judgment of the court is enlightened and its decision influenced by the exhaustive examination of both sides of the case and by the reference to pertinent authorities. But in the former case, only one side is examined and discussed, and that usually with less thoroughness and care than in adversary proceedings. If no one is interested in opposing the judgment asked for, the court hears none of the reasons which avail against it, and which, if duly considered, might bring about a different result. Indeed, it has been said that "no sentence of any court is entitled intrinsically to the least respect in any other court or elsewhere, when it has been pronounced ex parte and without an opportunity for defense."[176] For substantially the same reasons, the value of a case as a precedent is weakened or even destroyed by the fact that the decree or order was made by consent.[177] On this ground an inferior court of New York declined to follow a decision of one of the superior courts of the same state, saying: "Under ordinary

[176] Irby v. Wilson, 21 N. C. 576. And see Regina v. Hughes, L. R., 1 P. C. Cas. 92.

[177] Forster v. Hale, 3 Ves. 713.

circumstances it would be incumbent upon this court to follow the decision of the General Term without further consideration, were it not for the fact that the affirmance of the General Term was pro forma, and without argument or consideration, and for the avowed purpose of hastening a determination by the court of last resort." [178]

Decisions rendered upon preliminary or interlocutory proceedings are also considered as of comparatively slight value, both because the particular rulings may be changed before the final disposition of the case, and because such proceedings, for the most part, are not worked up with the same care, or argued and considered with the same exhaustive thoroughness, as the final appeal in a cause. This is very well illustrated in an opinion of the Supreme Court of New York criticising a former decision which was strongly pressed upon it as decisive of the case at bar. It was said: "We do not think the case entitled to the authority of a judgment upon the point in question. The case itself was a non-enumerated motion, a decision upon which is never regarded as res judicata. The disposition of this class of cases is constantly made upon equitable considerations, which address themselves to the discretion of the court, and relief is frequently granted on equitable terms, against the strict legal right of the parties. The judgment in this case was merely a refusal to stay the proceedings in a cause after verdict, to enable the applicant to move for a new trial upon newly discovered evidence, and the decision might well have been placed upon the ground assumed by the circuit judge in refusing to grant the same order, which in no respect involved the principle now under consideration. It is manifest, from the report of that case, that it did not receive a deliberate examination either by the counsel or the court. No one of the cases upon the subject of gifts causa mortis appears to have been brought to the notice of the court, and none of the objections which in other cases have been held fatal were alluded to by the judges in the brief remarks that fell

[178] Matter of McGinness' Estate, 13 Misc. Rep. 714, 35 N. Y. Supp. 820.

from them in disposing of the motion." [179] But these considerations do not always or necessarily apply to decisions upon demurrers. It has been held, for instance, that a decision rendered by the supreme court of a state construing a statute of the state, is none the less binding upon a federal court in a subsequent suit because it was made upon a demurrer.[180]

HYPOTHETICAL, FRIENDLY, AND TEST CASES

26. A decision rendered upon a moot question or one not involved in the issues in the case, or in a purely hypothetical case, has no force as a precedent. But it is otherwise as to a decision in a case involving a real controversy and real conflicting interests, though it is an amicable action and made up for the purpose of obtaining the opinion of the court as in a test case.

It is the duty of appellate courts, as well as of those of first instance, to pass judgment only upon the cases actually before them. They have no jurisdiction to pronounce judgment on moot questions or hypothetical cases. "Our judicial system," says the court in California, "has not as yet provided for the establishment of moot courts, or made it our duty to solve legal conundrums for purposes of mere amusement or instruction." [181] And where there is no jurisdiction, it does not belong to the proper functions of a court to give an opinion upon a matter submitted for the guidance of parties or tribunals, even where the parties consent to and invite such an opinion.[182] Or, as stated by a court in Pennsylvania, the court cannot be asked to give an opinion upon a question of law, except in a proceeding brought, not merely to ascertain the law, but to

[179] Harris v. Clark, 2 Barb. 101.
[180] Westerly Waterworks v. Town of Westerly (C. C.) 75 Fed. 181.
[181] Donner v. Palmer, 51 Cal. 637.
[182] State of Mississippi v. Durham, 4 Mackey (D. C.) 235.

settle a real dispute.[183] "If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding before them, even though the decision would be 'of great value to the General Assembly' in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized and dangerous in its tendency. Not only this, but it would be an attempt to settle questions of law involving the rights of persons, without parties before it or a case to be decided in due course of law, thus violating the provision of the Bill of Rights which declares that every person shall have a remedy for an injury done him by due course of law." [184]

It follows from this that the court must consider the whole of the case actually before it, and only the case as it is presented by the record. It is true that appellate courts will sometimes rest their decision upon a particular point emerging from the facts or pleadings in the case, where the determination of that special point is enough to show the disposition which must be made of the controversy. But in general, if the decision is based upon a state of facts which does not exist in the case, or upon a state of facts which is in part assumed or imagined by the court, or upon a mistaken conception of the issues in the cause, or upon certain elements of the case which are misleading unless considered in their relation to others not referred to, the decision made will not be entitled to the authority of a precedent, because it will be without jurisdiction and therefore unofficial. Just as a trial court acts without jurisdiction if it assumes to go beyond the issues in the case and pass upon matters not submitted by the parties and not connected with the controversy raised by the pleadings, or to render a judgment or decree not invited or asked for by the litigants, so it is with the decision of an appellate court where the opinion does not correspond with the questions actually raised by the record. Hence a decision of an appellate court based on a statute which had in fact

[183] Rockwell v. Warren County, 34 Pa. Super. Ct. 581.
[184] State v. Baughman, 38 Ohio St. 455, 459.

been repealed at the time the decision was made, has not the force of a precedent and cannot control subsequent decisions.[185]

Still another problem is presented where the suit begins in a real controversy between actual adverse parties, but the subsequent course of events, outside the court-room, so fixes their rights or interests that they can no longer be influenced, one way or the other, by the decision of the case. On this point, a learned court in New York, speaking of a question arising under the election laws, observes: "Whether courts will decide a case involving a question which has ceased to be of practical importance to the parties seems to depend upon whether the question involved is one of public importance. The question in this case is one of great public interest, affecting the rights of all the electors in this state, and I think the courts should determine it."[186] But the important thing to notice, for our present purpose, is that if such circumstances appear or are disclosed in the opinion of the court, it cannot possess very much value as a precedent. For such a decision would necessarily be more or less academic; and though it could not be described as extra-judicial, the controversy having been a real one at its beginning, yet the decision would avowedly be made more for the purpose of informing and guiding the general public than for the settlement of the rights of the immediate parties, and therefore would partake of the nature of a merely advisory opinion.

But a test case is different. It does not detract from the authority of a decision as a precedent that it was rendered in a friendly suit which was made up for the purpose of obtaining the opinion of the court in as summary a way as possible, and intended as a test case.[187] In other

[185] Elfring v. New Birdsall Co., 17 S. D. 350, 96 N. W. 703.

[186] Matter of Cuddeback, 3 App. Div. 103, 109, 39 N. Y. Supp. 388.

[187] Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683: Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641. Compare Doe v. Hicks, 7 Durn. & E. 437, where it was said by Kenyon, C. J., that a case cited to him "ought not to be relied on as an authority because it was an amicable suit, and the bill was filed merely to remove all doubts."

words, the fact that there is no actual present collision of rights or claims between the immediate parties to the suit is immaterial, if there is an actual question of law involved, of real and practical importance, and of such a nature that its decision will or may seriously affect their rights or influence their conduct, and if the case is genuinely contested and deliberately considered by the court.

ADVISORY OPINIONS

27. An advisory opinion by the supreme court of a state, given in response to a question propounded to it by the executive or legislative department, is generally considered to be without force as a precedent and not binding even on the court which rendered it; and so of any opinion given by way of mere advice or instruction to other courts or to suitors.

Under the general principle of the constitutional separation of the three departments of government, the courts cannot be required to render their opinions upon questions of law, except in cases actually before them. But in a few of the states, the constitutions empower the executive or legislative departments to demand the opinion of the supreme court, or of the justices thereof, upon important questions of law and upon solemn occasions. The effect of the opinions thus rendered, as precedents for the determination of similar questions, propounded in the same way or arising in the ordinary course of judicial administration, varies in the different states which have adopted this constitutional provision. In Massachusetts, it is said: "In giving such opinions, the justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity." [188]

[188] Opinion of the Justices, 126 Mass. 557.

Hence these advisory opinions are not regarded as precedents, in such sense that the court, as such, will feel obligated to adhere to them and follow them in controversies between private persons. "As we have no means, in such cases, of summoning the parties adversely interested before us, or of inquiring in a judicial course of proceeding into the facts upon which the controverted right depends, nor of hearing counsel to set forth and vindicate their respective views of the law, such an opinion, without notice to the parties, would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment binding on the rights of parties." [189] But in Colorado, on the other hand, where the constitution provides that "the supreme court shall give its opinion upon important questions upon solemn occasions, when required by the governor, the senate, or the house of representatives, and all such opinions shall be published in connection with the reported decisions of the court," it is held that the opinions have the force and effect of judicial precedents. The reasons are explained by the supreme court of that state, as follows: "By the express words of the corresponding provisions in each of the other states, the questions are limited to questions of law, and the justices, not the court, are to respond. These officers appear to be merely legal advisers, occupying much the same relation in this regard to their respective general assemblies as does the attorney general of Colorado to the state legislature. Their written responses, when questioned, are not always published in the reports. They are not pronounced by the court, and hence are not technically judicial decisions, nor do they necessarily constitute judicial precedents. In this state, on the other hand, the interrogatories are not expressly limited to questions of law, and it is the court, not the justices, that must answer. For obvious reasons, we hold that the intent could not have been to authorize ques-

[189] Opinion of the Justices, 5 Metc. (Mass.) 596. See, also, Green v. Commonwealth, 12 Allen (Mass.) 155; Answer of the Justices, 122 Mass. 600; Answer of the Justices, 148 Mass. 623, 21 N. E. 439; Adams v. Bucklin, 7 Pick. (Mass.) 121.

tions of fact, but our responses must be reported, as are other opinions, and they have all the force and effect of judicial precedents." [190]

Again, if an appellate court undertakes to give advice to the inferior courts, or to suitors in other litigations, its opinion, though cast in the form of a decision, is no precedent, because not properly judicial action. Indeed, such action would be without jurisdiction. The functions of an appellate court, it has been said, are exhausted when it has ruled on the specific assignments of error submitted, and it has no jurisdiction to file a mere advisory opinion, touching extraneous questions, expressed for the purpose of influencing future litigation.[191] Neither will an appellate court undertake to give an advisory opinion to an inferior court after the latter has rendered its judgment in the particular case.[192] But it is held that a supreme court has jurisdiction to act on a petition of its clerk for a construction of the law upon a question arising in the actual administration of his office.[193]

NEW AND ISOLATED DECISIONS

28. A decision upon an entirely novel question is not at first entitled to great weight as a precedent, unless intrinsically able to command respect; but it gains force by being approved and followed in subsequent cases in the same or other jurisdictions.

29. A single or isolated decision upon any given point of law is not regarded as possessing the same authority or conclusive effect, as a precedent, that would be attributed to a series of decisions on that point, unless elementary in character, or un-

[190] In re Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478. And see In re House Resolutions Concerning Street Improvements, 15 Colo. 598, 26 Pac. 323; In re Priority of Legislative Appropriations, 19 Colo. 58, 34 Pac. 277.

[191] Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593.

[192] Ex parte Barker, 7 Cow. (N. Y.) 143.

[193] Ex parte Brown, 166 Ind. 593, 78 N. E. 553.

less it has been acquiesced in or stood unchallenged for a long time.

30. As between two discordant decisions, which are theoretically of equal authority, the general rule is to give the preference to the one later in time.

Cases of First Impression

A case is said to be "of first impression" (or res nova or res integra) when it presents an entirely novel question of law for the decision of the court, and cannot be governed by any existing precedent. Such a case may grow out of the necessity of construing a recently enacted statute, or may be based upon the alleged applicability of a familiar rule of law to a new state of facts, or may arise from the need of adjusting the body of the unwritten law to the increasing complexities of industrial and commercial development and the discovery and application of new forces and agencies in the material world. The opinion of the court in a case of first impression is not ranked so high, in the scale of authority, as one which is supported by concurring decisions in the same or other jurisdictions. Its weight must depend upon the soundness of the court's reasoning and the correctness of the analogies which it brings to bear in support of the conclusion, and which, in the absence of direct authorities, are the chief arguments which can be adduced. Moreover, it is difficult, if not impossible, to foresee the effect which the new decision may have on the existing law and on the course of dealings under it. But every familiar rule of case-made law began originally in a case of first impression. The decision in such a case may be entitled to much respect if well reasoned. It may proceed from a court which has a very high reputation for learning and ability. The opinion may be distinguished by close and sound argument, exhaustive research, copious citation of authorities, or a wealth of illustration and analogy, and may give evidence of thorough study and mature deliberation. These considerations will give it commanding authority. Then it becomes a leading case, and may furnish the starting point of a long and impregnable

line of cases. And such a decision gains force and strength with every succeeding decision which rests upon it and conforms to its doctrine.[194]

Isolated Cases

A single decision may constitute a precedent which the courts will positively refuse to overturn. It may have settled a rule of law so elementary, and so universally regarded as just, that the question has not again been brought into contention before the courts. Or the single case, being generally acquiesced in and made the basis of private dealings and the foundation of private rights, and never doubted or overruled, may have established a rule of property which the judicial tribunals will be reluctant to disturb.[195] But speaking generally, isolation tends to weaken the force of a precedent. Every decision increases in weight in proportion as it is relied upon and followed in succeeding cases. On the other hand, the fact that a given case has not been cited or followed tends to show (unless it is a recent decision) that it has not been regarded as good authority. Hence we may lay down the general rule that a single decision upon any given point of law is not regarded as authoritative or conclusive as a precedent in the same degree that a series of decisions upon that point would be.[196] Especially where a prior decision rests upon an unsound basis or an erroneous application of principles, the courts will be much more willing to overrule it than to disturb a connected line of cases holding the same views.[197] "When a question arises involving im-

[194] See 23 Am. Law Rev. 170, article by Mr. Justice Miller on "The Use and Value of Authorities."

[195] Davidson v. Biggs, 61 Iowa, 309, 16 N. W. 135.

[196] Duff v. Fisher, 15 Cal. 375; Woolsey v. Judd, 4 Duer (N. Y.) 389. "In a single case, such a claim was allowed. That decision, though by a very able judge, and sustained on appeal, is a new departure in the law of bankruptcy." Hersey v. Fosdick (C. C.) 20 Fed. 44.

[197] Garland v. Rowan, 2 Smedes & M. (Miss.) 617. "It is a single case; it is contrary to reason and common experience; and such a determination would make such a confusion in all the property of the people of this kingdom, that I own I should have no

portant public or private rights, extending through all coming time, which has been passed upon on a single occasion, and that decision can in no just sense be said to have been acquiesced in, it is not only the right but the duty of the court, when properly called upon, to re-examine the questions involved and again subject them to judicial scrutiny." [198] A still more advanced view is taken by the Supreme Court of South Carolina in an opinion from which we quote as follows: "When the court is asked to follow the line marked out by a single precedent case, it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. There are three elements that enter into the authority of a case claimed to stand as a leading case on the general principles of the law: first, the unanimity with which its judgment was pronounced; second, the fact that it has been followed; and third, the duration of time during which it has been openly followed or tacitly assented to. As, then, the authority of such a case is distinctly fortified by the next succeeding case, it is obvious that, in the decision of the latter, the solidity of the grounds of the former conclusion should be inquired into; for it is only where resort is had to the original sources, and a concurring result obtained, that the first decision can be said to be fortified by that which follows it. An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis." [199] So also it is said in Washington that, while a single decision of the supreme court determining the law in a particular case constitutes the law of that case, it is

regard to it, but think that the contrary ought to be declared to be law." Tapner v. Merlott, Willes, 182, per Willes, C. J. "We do not think that any court has ever held that when there has been an erroneous decision in one case only, and when the doctrine of all cases that have preceded and followed it in reference to the matters decided is contrary to the doctrine of that case, it will be upheld as stare decisis." Groesbeck v. Golden (Tex.) 7 S. W. 365.

[198] Pratt v. Brown, 8 Wis. 668.

[199] State v. Williams, 13 S. C. 546.

not conclusive, on the principle of stare decisis, of the issue decided where it has not been followed or applied in other cases, since it has not established a fixed rule.[200]

Preference Between Recent and Ancient Decisions

In the case of two precedents on the same question, which are theoretically of equal authority in principle, but are discordant and irreconcilable, the general rule is to follow the later rather than the earlier of them.[201] Thus, in a case before the Supreme Court of Pennsylvania, it was said: "That the English cases are not all harmonious or consistent may be admitted, but the leaning of the later cases, there as well as here, has been to favor the vesting of interests wherever there are reasonable grounds for such construction."[202] But this applies only where the authority of the two dissonant cases is at least approximately equal. Hence their value must be appraised in the light of all those considerations which may affect the force of a precedent. An ill-considered or unsatisfactory decision, though of recent date, is not to be preferred to one marked by sound reasoning and thorough research, though rendered long ago. The rule is therefore not invariable. The earlier decision may be preferred and adhered to if it appears to the court to be a much stronger and better authority, or, on the other hand, if the later decision is considered to have been wrongly decided, ruled upon scant consideration, or wrong in principle.[203] Thus, the court in California declares that the doctrine of stare decisis should lead it to conform its decisions to a principle of commercial law established all over the world, rather than to follow a decision of its own made a few years before, where such decision is a decided and probably injudicious innovation upon that principle.[204]

[200] McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116.

[201] Harper v. Charlesworth, 4 Barn. & C. 589.

[202] Allen's Estates, 109 Pa. 489, 1 Atl. 82.

[203] Purcell v. Macnamara, 9 East, 157; Barnes v. Crowe, 1 Ves. Jr. 495.

[204] Aud v. Magruder, 10 Cal. 282.

LEADING CASES; ANCIENT CASES

31. A leading case is one which first definitely settled an important rule or principle of law, and has since been often and consistently followed. The authority of such cases is of the very highest.

32. An ancient decision, which has been long accepted as a correct exposition of the law, or which has been repeatedly approved and followed, possesses great weight as a precedent and will not be overruled or departed from except for the most cogent reasons. But such a decision may become obsolete in consequence of changed social or political conditions, or its authority may be gradually undermined by the slow but steady drift of judicial opinion away from the doctrines or principles which it enunciated.

Leading Cases

A leading case is one which, being either the first to deal with a given rule or principle of law or the first to investigate and discuss the same with special care, thoroughness, and learning, has been generally accepted as definitely settling the law on that point, and has been subscribed to and followed in many subsequent decisions. Leading cases are regarded as possessing exceptional importance and authority in the law, and the overruling of such a case is a very rare and remarkable occurrence.

Authority of Ancient Decisions

That a decision is of ancient date may very greatly strengthen its authority. If it involved the same questions which are now raised, and the same grounds of decision are considered as applicable, the fact that the earlier decision has for so many years stood unchallenged, that it has been acquiesced in and accepted as good law, that it has become a rule of property,—these are considerations which add to its authority, and directly in proportion to its age. "Other things being equal, a precedent acquires added au-

thority from the lapse of time. The longer it has stood unquestioned and unreversed, the more harm in the way of uncertainty and the disappointment of reasonable expectations will result from its reversal. A decision which might be lawfully overruled without hesitation while yet new, may, after the lapse of a number of years acquire such increased strength as to be practically of absolute and no longer of merely conditional authority." [205] So, in the language of Chief Justice Best, "undoubtedly every respect is due to an ancient decision when, from time to time, it has been acted upon. Vires acquirit eundo. By passing down a series of years, and being from time to time recognized by every writer, ancient decisions acquire a degree of authority which does not belong to modern decisions, not from being more consonant with justice, but that they have the sanction of time." [206] Even though an ancient decision stands alone, in the sense that it is an isolated case which has never been followed in any subsequent case, yet its antiquity gives it authority, if it has not been disapproved or criticised; because the latter circumstance entitles us to presume that it has been always acquiesced in as a correct exposition of the law. This has been pointedly stated by one of the federal courts, in the following terms: "It will scarcely be claimed that a single decision, squarely presented, may not become settled law by acquiescence of years. Surely it is not necessary in law, any more than in liquids, that a repeated agitation or stirring up is essential to an abiding settlement. Once settled, it so remains, until in some manner it is disturbed." [207]

But on the other hand, if no rule of property is involved, but the decision in the ancient case depended upon the existence of a state of society which is now obsolete, or upon views of public policy or the policy of the law which have given place to entirely different opinions, its authority

[205] Salmond, Jurisprudence (2d Ed.) p. 168. And see Halsey v. Superior Court of City and County of San Francisco, 152 Cal. 71, 91 Pac. 987.

[206] Garland v. Jekyll, 2 Bing. 301.

[207] German Ins. Co. v. City of Manning (C. C.) 95 Fed. 597.

should be held to have evaporated, and it is not incumbent on the courts to submit to its doctrines. We shall have more to say on this point in a later section.[208] Moreover, it does sometimes occur that the authority of an ancient and once highly respected decision is gradually undermined and finally destroyed, not by changing conditions in the body politic, but by changing judicial opinion. There may be a long course of subsequent decisions, dealing with the same point, not one of which avowedly overrules or disapproves the original precedent, but only attempts to "distinguish" it, but each of which involves a departure from its principles, slight and almost inperceptible at first, but advancing by degrees, until at last there results the establishment of an entirely different rule or principle. On this point, the remarks of Professor Salmond are highly instructive. "A moderate lapse of time," says he, "will give added vigor to a precedent, but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the ancient and perhaps partially forgotten principle with later decisions. Without having been expressly overruled or intentionally departed from, it may become in course of time no longer really consistent with the course of judicial decisions. In this way the tooth of time will eat away an ancient precedent and gradually deprive it of all its authority. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative." [209] Where there is reason to suspect that this process has been going on, no reliance should be placed on an ancient precedent until the whole course of subsequent decisions upon the same subject-matter has been carefully examined. The search may result in the rejection of the early decision as worthless, or, conversely, it may enable us to ascribe to it additional prestige and authority.

[208] See infra, p. 146.
[209] Salmond, Jurisprudence (2d Ed.) p. 168.

CASES INVOLVING SPECIAL OR PECULIAR FACTS

33. A case decided upon its own special or peculiar circumstances, or only with a view to avoiding special hardship in the particular case, cannot be relied on as an authority for any broad or general principle of law apparently implicated in it.

In support of this rule, the cases cited in the margin should be consulted.[210] The rule is well illustrated by the history of the case of Bowsher v. Watkins, 1 Russ. & Mylne, 277, as discussed in a case in Maryland, in which the authority of that decision was "strongly pressed" upon the attention of the court. The ruling was to the effect that residuary legatees may maintain a bill for an account against the executor and the surviving partner of the testator, although collusion between the defendants was neither charged nor proved. Says the court in Maryland: "The judgment given in that case by Sir John Leach is very brief and assigns no reasons. The report simply states that the Master of the Rolls was of the opinion that the plaintiff had a right to sustain the bill against the surviving partner. But the authority of that case, as sustaining the broad general proposition contended for, has been thoroughly discredited by the more recent decisions. Thus, the Master of the Rolls, Lord Langdale, says of it in Davies v. Davies, 2 Kean, 539, 'I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case a bill might be filed against an executor and the surviving partner of the testator without charging or proving

[210] Claflin v. Wilcox, 18 Vt. 610; Lickbarrow v. Mason, 2 Durn. & E. 73; Town of Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923, where the court, as a reason for not conceding very much force to a decision of a court of the state whose law was in question, said: "The case is an exceptional one, depending on its peculiar circumstances."

fraud or collusion.' And in view of these explanations of it, Vice Chancellor Sir Charles Hall, in the more recent case of Yeatman v. Yeatman, L. R. 7 Ch. Div. 214, said: 'I agree with what was said by the defendant's counsel here, that that case had better never be referred to again as supporting any such general proposition.'" [211] As to the other branch of the rule stated above, it is a familiar saying that "hard cases make bad precedents." It weakens or destroys the authority of a precedent that the case was decided as it was only because a contrary decision would have worked hardship in the particular instance, the decision, as is usual under such circumstances, being supported neither by authority nor by legal reason.[212]

CASES DOUBTED, CRITICISED, OR OVERRULED

34. A decision which has been overruled by the court which rendered it, or reversed on appeal, is no longer to be cited as a precedent in those courts or other courts of the same system. But in other jurisdictions, while its authority is more or less impaired, it does not follow that it must be entirely rejected.

35. It detracts from the value of a decision, as a precedent, that it was given with doubt and hesitation by the court rendering it, or that it has been criticised or disapproved by the same court, by other courts of learning and ability, by the authors of standard text-books, or by the legal profession generally.

Overruled Cases

If a decision has been expressly overruled, either by the same court which rendered it or by a court exercising appellate jurisdiction over it, it can of course no longer be cited as a precedent in those courts or in other courts of the same system, that is to say, the courts of the particular

[211] Rosenzweig v. Thompson, 66 Md. 593, 8 Atl. 659.
[212] See Mooney v. Edwards, 51 N. J. Law, 479, 17 Atl. 973.

state or those of the United States, as the case may be.[213] The latest utterance of the court on any given point constitutes the authority which is not to be departed from without cause. And this is also true of decisions overruled, not avowedly but by necessary implication, in a subsequent case.[214] But here it is necessary to show, beyond reasonable question, that the two authorities are really absolutely inconsistent rulings on a substantially similar state of facts. On analogous principles, if it is shown that the rule announced in a particular case was unnecessary to its decision, and was in fact obiter dictum, its authority as a decision on that point is lost; and if this criticism of it is made by a superior court, the effect is the same as that of overruling a decision. Thus, the force of a decision rendered by an intermediate appellate court, as an authority, is destroyed by a decision of the supreme court of the state that the questions passed upon were not involved in the case.[215] If there is any exception to the rule that an overruling decision destroys that which it overrules, and takes its place as an authority, it would probably be made in the case of a single decision, deemed clearly erroneous, which should overrule a series of previous authorities or unsettle the established principles of commercial or statutory law.[216] Where a rule of law has been settled by the decisions of the courts, but afterwards the legislature changes it by direct enactment, the authorities which announced it are no longer of any force or value as precedents, though they may be used, in other jurisdictions, as evidence of what the law was before the interference of the legislature.[217]

We are next to inquire as to the weight and value of a decision which has been overruled, when it is cited as persuasive authority in the courts of another state or country.

[213] Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066.

[214] See, for instance, remarks in James v. Gillen, 3 Ind. App. 472, 30 N. E. 7.

[215] Ex parte Conley (Tex. Cr. App.) 75 S. W. 301.

[216] See Aud v. Magruder, 10 Cal. 282; Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 474.

[217] Lemp v. Hastings, 4 G. Greene (Iowa) 448.

Here the court to which the argument is addressed is supposedly under no kind of obligation to follow either the overruled or the overruling decision; but both stand before it in the character of more or less influential arguments. The question will then be whether the original decision or that which overruled it is the more worthy of respect and adherence. Undoubtedly the force of a precedent is much weakened, not only at home but elsewhere, by the fact that subsequent opinions have pronounced it incorrect and set it aside as a judicial blunder.[218] But still a court in another jurisdiction may not share this opinion. It may be convinced that the original decision was right in principle, and that the blunder occurred in overruling it. In that event, there is no impropriety in following it, disregarding the later ruling. More especially is this the case where the original decision, notwithstanding the discredit thrown upon it at home, has been regarded as correct by numerous other courts. This is aptly illustrated by an opinion of the Supreme Court of Ohio, wherein it was said: "The rule which we think should govern in the case at bar is in keeping with the decision in Rolt v. Watson, 4 Bing. 273, a case overruled in England but not in America, and which, in our judgment, commends itself as an authoritative exposition of the law on the subject-matter adjudicated." [219] The case is of course different where the decision cited, though rendered in another jurisdiction, is binding as a precedent on the court to which it is cited, as in the instance of a decision of the highest court of another state construing a statute of that state, or in the case of a judgment of the supreme federal court interpreting the Constitution of the United States. In such cases, a decision distinctly overruled in the jurisdiction where rendered is of no authority elsewhere. It is the latest declared opinion which must be accepted as authoritative.

[218] See remarks in Brechbill v. Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695, and in Colegrove v. Smith (Cal.) 33 Pac. 115.

[219] Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526.

Cases Doubted or Criticised

It very seriously impairs the value of a decision as a precedent that the court arrived at its final conclusion with much hesitation, or expressed doubt of the correctness of its judgment. As observed in one of the cases, where "the views expressed were not altogether satisfactory to the court, the opinion will hardly be more convincing to the profession than it was to the court." [220] This does not very often happen. But not infrequently it is found that the same judges who decided a case, or subsequent judges, have expressed dissatisfaction with it. Thus, in an opinion of the United States Supreme Court it is said, in regard to a rule of the common law, that Lord Mansfield "exceedingly lamented that ever so inconvenient and ill-founded a rule should have been established" and called it "absurd." [221] It need hardly be said that such comment, from such a source, would destroy the value of a precedent. But the court's disapproval of a prior decision is sometimes manifested in a reluctance to extend its doctrine beyond the very narrowest limits consistent with its continued recognition, or by the fact that the court, while following the earlier ruling, does so with expressions of dissatisfaction or of regret at the necessity of so doing. This also seriously detracts from its force as a precedent.[222] And generally speaking, where a decision has been adversely criticised, condemned as incorrect, or regretted as a mistake, by the court which rendered it or by other courts of co-ordinate authority, it sinks very low in the scale of authority, and cannot be redeemed from the discredit thus cast upon it, unless it may be in very exceptional instances, where it furnishes very strong intrinsic evidence of being right.[223]

[220] People of State of Colorado v. Boylan (C. C.) 25 Fed. 594.

[221] Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835.

[222] See McClain v. Davis, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634, in dissenting opinion of Brannon, J.

[223] Illustrations of this rule may be seen in the following cases: Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635; Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371; Hunt v.

Often the courts of one state will thus doubt or disapprove the decisions of another state. That fact will prevent their being used with effect in the state where such criticism has been expressed; but adverse comment upon a case, made in a foreign state, does not always impair the authority of a decision in the state where it was rendered.

Neither can a case be very confidently relied on as a precedent if its doctrine has been disapproved or condemned by legal text-writers of acknowledged ability and learning, whose works are considered standard authorities on the subjects to which they relate.[224] And the same is true, though perhaps in less degree, where a decision gives great dissatisfaction to the legal profession generally and is severely criticised by them. This, for example, was the reason assigned by the court in Rhode Island for declining to follow a decision made by Cockburn, C. J. It was pointed out that the ruling in question was much criticised, and led to a vigorous discussion of the subject in the public prints, in the course of which the chief justice himself issued a pamphlet in defense of his decision, in which, however, he somewhat qualified the apparent doctrine of the case and made some concessions.[225] Other instances might easily be cited in which the authority of a decision has been shaken by the criticism of the bar; but

Fowler, 121 Ill. 269, 12 N. E. 331; Griffith v. Ventress, 91 Ala. 366, 8 South. 312, 11 L. R. A. 193, 24 Am. St. Rep. 918; Garland v. Jekyll, 2 Bing. 292; The Milan, Lushington, 388, 403; In re Barber, 1 Smale & G. 122. In the case last cited, it was remarked of the case of Jones v. Colbeck, 8 Ves. 38, that "that case has the singular property of being often cited as authority, always considered as open to objection, and never followed."

[224] Texas & P. Ry. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942. And see Wood v. State, 47 N. J. Law, 461, 1 Atl. 509, where it was said of a decision in another state: "It has been cited without commendation, if not with dissent, by such authors as Dr. Wharton." And see Town of Palatine v. Kreuger, 121 Ill. 72, 12 N. E. 75, where the court remarked that it was "not inclined to follow" a certain decision from another state, giving, as one reason, that "this case is referred to in Dillon on Municipal Corporations, and the author thinks the case erroneously decided."

[225] State v. Murphy, 16 R. I. 528, 17 Atl. 998.

we shall mention only a decision of the Supreme Court of Pennsylvania, as to which, we are told, "a reargument was applied for by counsel and refused by the Supreme Court. Afterwards, it being represented to the court by certain eminent members of the Philadelphia bar, who had given the subject of real-estate titles especial attention, that the decision, if adhered to, threatened the generally received understanding of the profession with reference to the rule in Shelley's Case, a reargument was ordered." [226] Criticism or disapproval from other sources may also, in exceptional circumstances, weaken the force of a precedent. For instance, the court last above referred to, in speaking of one of its own early decisions, with regard to the manner of settling the accounts of county treasurers, said: "If this case was ever considered as a correct exposition of the law touching this question, it has been, so far as is known, disregarded by the legislature, and, as we have been informed, by the city comptrollers, county auditors, and auditors general ever since, with one exception to which we have referred." [227]

But it is to be observed that a single decision may embrace several points of law or be capable of several applications. And the fact that it has been criticised, disapproved, or even overruled as to one of such points or applications does not necessarily impair its weight or value as to the remainder. Thus, speaking of an English case, the court in Vermont observes: "Though as to its merits, this case has been doubted and rarely followed, it does not seem to have been criticised on this point, and the Supreme Court of the United States adopts its language as one of the principles on which the action for money had and received is maintainable." [228]

[226] The case referred to is Carroll v. Burns, 108 Pa. 386, and the quotation is from an editorial note appended to the report of the case in the 18th volume of "The Reporter," p. 93.

[227] City of Philadelphia v. Martin, 125 Pa. 583, 17 Atl. 507.

[228] State v. Village of St. Johnsbury, 59 Vt. 332, 10 Atl. 531.

CASES APPPROVED OR ACQUIESCED IN

36. The force of a decision, as a precedent, is augmented by the fact that it has been approved or followed in subsequent cases, that it has not been criticised or has withstood unfavorable criticism, or that it has been generally acquiesced in by the legal profession.

It needs no argument to show how much force a precedent gains from the fact of its being approved in numerous subsequent cases of the same nature. Every decision increases in weight in proportion as it is thus relied on and followed. Buttressed by many concurring and approving opinions, it may become a rule of property, or a leading case, or otherwise of almost impregnable authority. Much the same effect is produced when a particular decision is found to be in harmony with a number of independent rulings on the same point by various other courts. Thus, in the federal courts, it is said that the obligation to follow the decisions of the other courts in patent cases increases in proportion to the number of courts which have passed upon the question; and the concordance of opinion may have been so general as to become of controlling authority.[229] Again, even without express approval in subsequent cases, the absence of any expressions of disapproval or dissatisfaction may augment the force of a precedent. Thus, Judge Deady, speaking of a former decision of his own, remarked: "This opinion has been before the world for more than two years, and on account of the importance of the subject has attracted some attention, but, so far as I am aware, it has received no unfavorable criticism, and time and reflection have fully satisfied me of the correctness of the ruling."[230] It happens occasionally that a decision is at first received with doubt or even disapprobation, but that time and experience show its correctness, and

[229] Brill v. Washington Ry. & Electric Co., 30 App. D. C. 255.
[230] Ex parte Koehler (C. C.) 30 Fed. 867.

convert the criticism into praise. This adds much to its prestige and authority. Thus, in an English case, it was said: "It is true that Smith v. Clay [Amb. 645] was at first a good deal cavilled at and objected to. The way, however, in which those objections—objections evidently taken per incuriam—have yielded to further inquiry and reflection, is extremely remarkable and instructive, and greatly adds to its weight as an authority." [231]

General acquiescence in a decision, on the part of the bar, the public generally, or the officers to whose duties or functions it relates, is testimony to its correctness and serves to strengthen its authority. This is said to be particularly the case with decisions involving the construction of statutory provisions relating to mere matters of procedure or practice.[232] Some degree of importance may also be attached to the fact that the decision has been acquiesced in by the parties immediately concerned and their counsel. The English cases, especially, are disposed to attribute considerable weight to decisions rendered at nisi prius, or on preliminary or interlocutory proceedings, from the fact (where it exists) that the parties did not appeal as they might have done if dissatisfied with the judgment, or if advised by counsel that they might obtain a reversal on appeal; and especially where the counsel concerned in the case was known to be a lawyer of ability and one characterized by reluctance to abandon, in the face of an unfavorable judgment, any proposition of law which he believed to be right in principle.[233] Thus, it was said, in reference to a decision at nisi prius: "Considering what able men were counsel upon that occasion, it is not to be supposed for a moment that, if that decision could have been at all questioned, it would not have been carried further. But all the world acquiesced in it; the parties and their counsel acquiesced in it, and the conduct of the parties is

[231] Campbell v. Graham, 1 Russ. & M. 478.

[232] Louisville & N. R. Co. v. Daniel, 131 Ky. 689, 119 S. W. 229; Edwards' Adm'r v. Lam, 132 Ky. 32, 119 S. W. 175.

[233] See Dalmer v. Barnard, 7 Durn. & E. 252; Brisbane v. Dacres, 5 Taunt. 157; Compton v. Collinson, 2 Bro. C. C. 385.

a great matter in these mercantile transactions." [234] So again, speaking of a case cited as a precedent: "Certainly it was not argued, but it is a most positive decision, and the counsel was certainly a most experienced advocate, and not disposed to abandon tenable points." [235] This presumption in favor of a decision is particularly strengthened if there have been numerous like cases, none of which was ever appealed, thus showing an agreement or acquiescence of the legal profession in general. As observed in an English case, "the circumstance of no writ of error having been brought to reverse any of these judgments is a strong *proof* of the universal opinion of the profession upon that *subject*." [236] Finally, it increases the value and importance of a case as a precedent that it has been cited with approval by a text-writer of acknowledged ability and learning.[237]

ARGUMENT BY COUNSEL AND CONSIDERATION BY COURT

37. The authority of a precedent is greatly increased by the fact that the case was exhaustively argued by counsel and fully and maturely considered by the court; and, on the other hand, it is diminished by the fact that the case was submitted without argument, or on scanty or insufficient argument, or that it did not receive the attentive consideration of the court.

The opinion in a case gains in weight and authority, and hence in importance as a precedent, in proportion as the point at issue was more fully discussed, more completely considered and comprehended by the court, and more elaborately elucidated in its judgment. Since it is the office of the briefs and arguments of counsel to bring to the

[234] King v. Humphery, 1 McClel. & Y. 191.
[235] Brisbane v. Dacres, 5 Taunt. 163, per Mansfield, C. J.
[236] King v. Lynn, 2 Term, 733.
[237] Monkton v. Attorney General, 2 Russ. & M. 165.

knowledge of the court the precise questions involved in the case and the authorities in accordance with which they are to be decided, and since the arguments at the bar tend to explain and develop such points and questions, it is generally considered that an opinion in a case which was well and fully argued is entitled to more respect and authority than one which received little or no such attention. "If a decision," says the court in New York, "is made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law." [238] So another court gives as a reason for approving and following an English decision that "the case was thoroughly argued and was most carefully considered by the court." [239] So the Supreme Court of Rhode Island, speaking of a decision made in New York, observes: "On account of the magnitude of the interests at stake, the case received in the court of appeals, from both counsel and court, an elaborate and exhaustive study and discussion. There is no reason to suppose that any argument or authority of any value, bearing upon the subject, can have escaped a thorough scrutiny and consideration. The conclusion of so able and learned a tribunal, so reached, though not binding on us merely as authority, is eminently entitled to respect, and it seems to us to be correct." [240] It is permissible also to take into consideration the fact that the counsel who prepared and argued the case were able and eminent lawyers, because the presumption is that their study of it was exhaustive, and consequently that the court had the benefit of all the light that could be shed upon the subject by the existing authorities and by sound and searching legal reasoning.[241] And moreover, the importance of a decision is augmented by the fact that it was not rendered until after a reargument or reconsideration of the case. Thus, a certain English case is said to be "of great au-

[238] People v. Mayor, etc., of City of Brooklyn, 9 Barb. 535.
[239] Glenn v. Howard, 65 Md. 40, 3 Atl. 895.
[240] Wood v. Hammond, 16 R. I. 98, 17 Atl. 324.
[241] See Lewis v. Campbell, 8 Taunt. 727.

thority, because it was twice argued at the bar, and Lord Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress." [242]

In effect, it may be said that the latter consideration, the attentive consideration of the court, is the important element in appraising the value of a precedent. But this is prepared for, and in a vital sense insured, by the thorough argument of counsel. If the one precedes, the other is practically sure to follow. It is for this reason that we find the two phrases, "solemn argument" and "mature consideration," so often associated in the remarks which courts have made in criticism of decisions. How much stress is laid upon the degree of care with which the opinion of the court was studied, may appear from the following quotations, all relating to the value of particular precedents cited. "That case underwent grave consideration by the court, which, at the time, was filled by very learned judges." [243] "That case was decided by Lord Chief Justice Hale and the other judges on great consideration." [244] "This is a case of the highest authority, especially valuable for the clear and able manner in which the argument is put in the judgment of Lord Erskine, who did not deliver his opinion until he had given the fullest deliberation to the question, and taken great pains to satisfy his mind." [245] Also it is to be noted that when a court changes its opinion in the same case, the later decision is entitled to additional respect from the fact that it evidences a more careful and mature deliberation given to the case, and therefore is more likely to be satisfactory in the thoroughness and soundness of its reasoning. Thus it is said in an English case: "Lord B.'s judgment in Lawson v. Lawson [4 B. P. C. 21] is entitled to the greater weight, because, when the point first came before him, he entertained a different opinion." [246] But of

[242] Gorton v. Falkner, 4 Durn. & E. 568. And see Chicago, K. & N. Ry. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. 472.

[243] Williams v. Germaine, 7 Barn. & C. 476.

[244] Liverpool Waterworks Co. v. Atkinson, 6 East, 512.

[245] Churchman v. Ireland, 1 Russ. & M. 254.

[246] Wilkinson v. Atkinson, 1 Turn. & R. 257.

course this must be taken subject to the limitation that the change of opinion shall have been induced solely by a reargument or reconsideration of the legal aspects of the case. If it was induced by political or any other extraneous influences,—a rare but not unknown event,—the opposite would be true.

Conversely, it detracts from the value of a decision, as a precedent, that there was no argument, or scant argument, of the question before the court, or that it was not adequately considered. Witness the following remarks by various courts upon the authority of various precedents cited to them: "It is to be observed that the case was very shortly argued, and that it does not appear to have received all that consideration from the court which it deserved." [247] "We look into these opinions in vain for the evidence of that solemn argument and mature deliberation which, upon the doctrine of stare decisis, should give to the case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question." [248] "The question does not seem to have been very fully argued, there being other and more prominent questions in the case, and the court, in their opinion, dispose of the matter very summarily and without much consideration." [249] "In the few cases which may be found holding the other way, the question does not seem to have received much consideration from the courts rendering the decisions, and the absence of argument in their support renders unnecessary any special reference to them." [250] "It will be seen from the opinions themselves and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel; and the question was evi-

[247] Doe v. Hutton, 3 Bos. & P. 650.

[248] People v. Mayor, etc., of City of Brooklyn, 9 Barb. (N. Y.) 544.

[249] Blais v. Minneapolis & St. L. R. Co., 34 Minn. 57, 24 N. W. 558, 57 Am. Rep. 36.

[250] Hine v. Manhattan R. Co., 132 N. Y. 477, 30 N. E. 985, 15 L. R. A. 591.

dently not fully considered." [251] "That case is of doubtful soundness, and the point relevant to this discussion seems to have been decided without much consideration and without any discussion of the authorities." [252] "We have some difficulty in dealing with this case, seeing that it was taken by Sir Robert Phillimore in chambers, where the learned judge had not the advantage of having the authorities on the point cited to him." [253] So, "it did not appear that the attention of the court had been directed in that case to" a passage in Coke upon Littleton.[254] So the Supreme Court of Rhode Island, speaking of one of its own former decisions, has said: "The case was a petition for an opinion on a case stated, and was doubtless submitted without full argument or presentation of authorities, so that the court, * * * supposing that there were two lines of decisions of about equal authority to choose between, naturally, without the consideration which it might otherwise have bestowed, chose that line of decision which was in accord with the rule in bankruptcy. The case is not without respectable support, but we have no doubt that we should have decided the case differently if we had had before us when we decided it the same array of authorities which we have before us now." [255]

For similar reasons, if the decision in the case should turn on a point not raised or argued by counsel, it is considered less valuable as an authority, and more easily to be disregarded, than where the reasoning and conclusions of the court are addressed to the very questions raised by the arguments at the bar. Thus, according to the court in New York, where an appellant submits his points without argument, and fails to notice an objection which would have been fatal, and omits to present any argument or authorities

[251] Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.

[252] State ex rel. McIntosh v. Greensdale, 106 Ind. 364, 6 N. E. 926, 55 Am. Rep. 753.

[253] The Hope, 49 Law Times (N. S.) 158.

[254] Doe v. Meyler, 2 Maule & S. 276.

[255] Allen v. Danielson, 15 R. I. 480, 8 Atl. 705.

upon the subject, and the decision is based upon such point, the court will not regard itself as concluded by what has been stated in the opinion, when a case involving the same question shall subsequently come before it.[256]

RANK AND REPUTATION OF COURT OR JUDGE

38. In estimating the value of a precedent, much importance is attached to the rank and standing of the court from which it proceeds, great deference being paid to those courts which possess an acknowledged reputation for learning and ability, or a special and intimate familiarity with the branch of the law to which the decision in question relates.

39. The authority of a decision may be greatly increased by the eminence or high reputation of the judge preparing the opinion, or by his expert knowledge of the subject involved. On the other hand, it is diminished if the opinion contains clear evidence of any bias or prepossession on his part.

40. The opinions of nisi prius and other inferior courts generally rank low in the scale of authority; but such an opinion may be intrinsically entitled to much respect for its learning or sound reasoning, and may be followed by superior courts in the absence of other precedents, or for other special reasons.

Rank or Reputation of Court

The value of an authority depends, to a very considerable degree, upon the rank of the court which rendered the decision. The judgments of the inferior courts, whether of the same or another state, for reasons which will presently be stated, are not generally regarded as possessing much weight. On the other hand, the decisions of the Supreme Court of the United States, even in cases where they are not technically binding on the state courts, are

[256] In re Lyman, 161 N. Y. 119, 55 N. E. 403.

received by the latter with the very greatest respect. And so, when English cases are cited in our courts, their authority is esteemed in proportion to the rank of the court from which they proceed, much greater deference being paid to the rulings of the court of last resort than to those of a nisi prius court. Again, among the appellate state courts of this country, there are some which have, throughout their entire history, or at least for considerable periods of time, deserved and obtained a very high reputation for learning, consistency, and sound judgment. Their opinions are formidable weapons in the arena, and are regarded by all courts with peculiar respect. Thus, it has been observed by a learned judge and able critic: "There are courts of the states which have long preserved their character for ability, care, and labor, and in regard to which it is sufficient to say at once that this is a case decided by the Supreme Court of Massachusetts, of New York, of Pennsylvania, or of South Carolina in her best days, to demand for it at once the consideration of the court." [257] But it is unfortunately true that the reverse of this proposition must also occasionally, though seldom, be taken into account. For example, in an opinion of the Supreme Court of Montana, it was said: "It is true there is one case, decided in Texas during the stormy days of reconstruction, by the military supreme court, in which an accused person was denied this right; but the opinions of that court have ceased to be quoted as authority, and are said to be decisions only of the cases therein tried. The opinion does

[257] 23 Am. Law Rev. p. 172, article by Mr. Justice Miller on "The Use and Value of Authorities." We may add, as testimony to the same point, the following remarks selected at random from the reports: The Supreme Court of Pennsylvania is "an appellate court of unquestioned ability." St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472. "The Supreme Court of New Jersey, which ranks among the ablest in the country." Allen v. Intendant & Councilmen of La Fayette, 89 Ala. 641, 8 South. 30, 9 L. R. A. 497. "The same doctrine has been repeatedly recognized by the chancellor and by the judges of the Supreme Court of the state of New York, who are justly ranked among the most enlightened jurists of this or of any other nation." State v. Ellis, 3 Conn. 190, 8 Am. Dec. 175.

not quote a single authority to sustain it, and does not seem to us to be well founded in reason." [258]

Again, the authority of a precedent is increased by the fact that the decision was made by a judge (or bench of judges) peculiarly skilled or versed in that branch of the law which the case involved. Thus the English reports will abundantly show that great and especial respect has been shown to the decisions of Lord Talbot and those of Lord Kenyon on real-property law, to those of Lord Mansfield on all questions of commercial law, to those of Gibbs and Denison on questions of pleading, and to those of Lord Macclesfield on evidence. So it is observed by the same learned judge above quoted that "it is obvious that, in the courts of states where, by reason of great cities, the commerce is extensive and the moneyed transactions of great value, the commercial law is of supreme importance, and the decisions are of commanding weight. So, also, there are states in which the purity of the separate jurisdiction in equity has been preserved far beyond that of others, and this adds to the authority of their decisions in such cases. There also may be, and there probably are, courts in which the land laws have attained a uniformity of administration rendering the decisions in regard to land titles of superior value." [259] For similar reasons, the courts of Louisiana have shown special deference to and reliance on the decisions of the high courts of France, when the laws of that country have furnished the foundation, or the analogy, on which the customary or statutory law of their own state was founded.[260]

Eminence of Particular Judge

The authority of a great name adds much to the strength of a judicial precedent. If the rule or principle announced

[258] Territory v. Hart, 7 Mont. 42, 14 Pac. 768; Id., 7 Mont. 489, 17 Pac. 718.

[259] Mr. Justice Miller, ut supra, in 23 Am. Law Rev. p. 172.

[260] See, for instance, Succession of Le Blanc, 37 La. Ann. 546; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; Bernard v. Whitney Nat. Bank, 43 La. Ann. 50, 8 South. 702, 12 L. R. A. 302; Mullins v. Blaise, 37 La. Ann. 92.

is one generally accepted or approved, it may impart to it almost the certainty of mathematical demonstration. If the question is a debatable one, it may easily suffice to turn the scale. It may even protect from successful impeachment a decision which lies so close to the line that it would be open to grave doubt if proceeding from a less eminent source. As remarked by Mr. Justice Miller: "While the main value of the authority of adjudged cases is in the character of the courts which decided them, it often occurs that this value is very much enhanced by the standing of the judge who delivered the opinion. If he be a man who has attained high reputation as a jurist, as a judge, as a law-writer; if he be one of those members of the legal profession who stands out prominently as a leading man of the times in the law, or in any particular branch of it, this character in the man from whom the opinion emanated is often of more value than the character of the particular court which may have made the decision." [261] To select

[261] 23 Am. Law Rev. p. 167. Note also, by way of illustration, the following examples selected from among the vast number which might be found in the reports: "That sound and able judge, Mr. Justice Campbell of Michigan." White v. Commissioners of Multnomah Co., 13 Or. 317, 10 Pac. 484, 57 Am. Rep. 20. "It is true that the claim of the defendant is supported by a dictum of Chief Justice Parsons; but notwithstanding the great respect which even a dictum of that eminent judge should receive, we are unable to assent to the defendant's contention." Commonwealth v. Wardwell, 136 Mass. 164. The Supreme Court of Indiana, in Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101, speaks of Chief Justice Gibson of Pennsylvania as "one of the ablest judges that ever occupied the bench." So, again, "the great reputation of Judge Hallett for erudition, especially in questions involving mining rights, gives rise to much diffidence upon our part in attempting to criticize his decision in that case." Watervale Min. Co. v. Leach, 4 Ariz. 34, 33 Pac. 418. "We are content to adopt the language of that great jurist, Chancellor Johnston, in announcing the judgment of the court in the case of Bradley v. Lowry, 1 Speers, Eq. 1 [39 Am. Dec. 142]." Gore v. Clarke, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465. Without intending any invidious discrimination against other jurists who are justly held in honor, or attempting to call the roll of the great men whose opinions have adorned American jurisprudence, we may surely add to the foregoing the distinguished names of Marshall, Story, Harlan, Brewer, Kent, Sharswood, and Cooley.

a few illustrations from the multitude which might be cited, we may mention a case in which the Maryland Court of Appeals, quoting from opinions of Chief Justice Parsons in Massachusetts and Chancellor Kent in New York, says: "Both of these great jurists cited and relied upon [a case] decided by Lord Chancellor King, assisted by the master of the rolls and Chief Baron Reynolds, and quoted with approval by Lord Hardwicke. These assuredly are authorities of great weight. We think that they ought to be considered as settling the law, although contrary opinions have been declared by some very learned courts." [262] So, in a case in Massachusetts, criticising an English decision, it was said: "That this case is very near the line is shown by the fact that such eminent judges as Blackburn and Mellor differed from the final decision of the House of Lords." [263] So again, in England, the very greatest respect is always paid to the rulings and decisions of Dr. Lushington upon matters of maritime and admiralty law, on account of his minute and exhaustive knowledge of the subject.[264]

Bias of Judge

Although the courts steadily refuse to adjudicate questions of a political nature, it will sometimes happen that the decision in a case may turn upon the political aspects of an act of legislation, or the balance may incline, in a doubtful case, according to the political prepossessions of the members of the court. So also, views of statecraft, opinions in political economy, specialized modes of legal thinking, or other personal bias, may indirectly and unconsciously warp the judgment of a just and impartial judge to such an extent as to make his decision no true exponent of the law but a merely personal opinion. Criticism of decided cases on this ground is always permissible, if honest, but should not be allowed to detract from the weight of the decision as an authority unless the facts

[262] Combs v. Combs, 67 Md. 11, 8 Atl. 757, 1 Am. St. Rep. 359.
[263] Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467.
[264] See, for instance, The Elin, 49 Law T. N. S. 87.

showing the bias of the judge are notorious and their influence upon the judgment is unmistakable.

Decisions of Co-ordinate Courts

Decisions of inferior courts are not imperatively binding upon courts of equal rank and co-ordinate jurisdiction. They do not possess the authority of decisions proceeding from the court of last resort. But they may be respected for their reasoning, and, on the principle of comity, they may be and frequently are followed for the sake of uniformity of decision. This applies as between the various circuit, district, or other lower courts of a state, and also as between the several co-ordinate courts of the United States.[265] In England, the traditional respect for the decision of a court of co-ordinate jurisdiction has been carried much further than in this country. Thus, in a case before Jessel, when Master of the Rolls, he said: "So strong has been my view [of the importance of adherence to precedents] that where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age and has been used by lawyers as settling the law, leaving to the appellate court to say that case is wrongly decided, if the appellate court should so think."[266] And in a comparatively recent case it was held by the Chancery Division of the Supreme Court of Judicature that they could not overrule a decision by the former Court of Chancery, that being a court of co-ordinate jurisdiction.[267] But even in England, this rule is not invariably applied. Thus, in a case in the Court of Queen's Bench, Lord Chief Justice Campbell is reported to have said: "We have been pressed with the authority of Drew v. Collins, 6 Exch. 670. To that authority we have paid the most sincere respect; but, after a very careful examination, we are not able to

[265] As to the former, see Chapter VII; as to the latter, see Chapter VIII.

[266] In re Hallett's Estate, 13 Ch. Div. 696, 712.

[267] Pledge v. Carr, [1895] 1 Ch. 51.

assent to the reasoning on which it rests. As it is only the decision of a court of co-ordinate jurisdiction, we do not consider ourselves bound by it; and we have the less reluctance to decide according to our own opinion, as, the question being upon the record, it may be carried to the Exchequer Chamber and the House of Lords." [268]

Decisons of Inferior Courts

A decision made by an inferior court, or one which is subject to the appellate or supervisory jurisdiction of a higher court, will be regarded by the court which made it as a precedent for its own future action, so long as it remains unreversed by the upper tribunal, and so long as that court has not rendered any decision contrary to or conflicting with it; and, in the same circumstances, it may be cited and relied on as a precedent in other courts of the same system which are of the same rank or of an inferior rank.[269] But in the higher courts, and in foreign jurisdictions the decisions of the inferior courts are not so highly esteemed as those which proceed from the appellate tribunals.[270] Aside from the supposition (not always well founded) that these courts are presided over by judges who do not possess the learning of the superior courts and that there may be a lack of thorough and exhaustive consideration in their judgments, there are special reasons which account for the comparatively low regard placed upon those judgments. In the state where such a court sits, its determinations are not binding upon the appellate court, because the same case or a similar case might be brought before it, and it would then of course be at liberty and under an obligation to con-

[268] Tetley v. Taylor, 1 El. & Bl. 521.

[269] In Texas, the refusal of the Supreme Court to grant a writ of error to review a decision of the Court of Civil Appeals raises the decision to the dignity of a final authority. Gray v. Eleazer, 43 Tex. Civ. App. 417, 94 S. W. 911.

[270] See Pike v. Daly, 54 N. J. Law, 4, 23 Atl. 7. That nisi prius decisions are not regarded in England as having much weight or entitled to much consideration, see Goodright v. Rich, 7 Durn. & E. 334; Lickbarrow v. Mason, 2 Durn. & E. 73, 74; Ball v. Herbert, 3 Durn. & E. 261; Fentum v. Pocock, 5 Taunt. 195; Parton v. Williams, 3 Barn. & Ald. 341; Steel v. Houghton, 1 H. Bl. 51, 63.

sider the questions involved unhampered by any but its own previous decisions. Still a court of last resort will sometimes yield its own judgment to the decisions of the inferior courts of the same system. This may happen when such decisions have been so frequently made, in the same way, and by different courts, as to have become a rule of property relied on by the people of the state generally. And even a single decision of an inferior court may acquire such strength from the lapse of time, and the vesting of rights and the making of contracts under it, that, having stood unreversed and unquestioned for a long period, the superior courts will not feel justified in departing from it and laying down a different doctrine.[271] On this doctrine we find the following very sensible and instructive remarks in an opinion of Lord Brougham in the House of Lords: "I have heard it said that precedents which might bind a court below are not therefore binding on a court of error, and it is suggested that some points, never having been decided by such a supreme court, may now be determined and disposed of differently from their determination in courts subject to our review. With this doctrine I am unable to go along. Admitting in its fullest extent the difference between a decision or a precedent in a court whence appeal lies and a court of last resort, I consider it as clear that the highest court is bound to view with the utmost respect the practice and the decisions and the precedents in the courts below, as evidence of the law which we, as well as those courts, administer, and only to overrule their decisions when we find it clear, beyond all doubt, that they have mistaken the law. The difference is this between them and us,—between the supreme court and a court from which lies an appeal,—they might be convinced that their own

[271] Pugh v. Golden Valley R. Co., 15 Ch. Div. 334; Plummer v. Plummer, 37 Miss. 185. And see Heinz v. Lutz, 146 Pa. 592, 23 Atl. 314, where Chief Justice Paxson quoted from one of his own previous decisions given in a common pleas court, saying that it had been "generally accepted as law." And see Peabody v. Landon, 61 Vt. 318, 17 Atl. 781, 15 Am. St. Rep. 903, where the Supreme Court of Vermont decided a case of first impression on the authority of decisions previously made in the inferior courts of the same state.

former decisions were erroneous, and yet might feel bound by their own precedents (though cases are not wanting where they have got rid of those precedents and overruled them, but those are rare), whereas we are not bound at all when we see manifest error in the precedents cited, any more than when we see manifest error in the particular case at bar on which those precedents are brought to bear. But then our opinion must be quite clear that the error has been committed, else a uniform course of precedents must, generally speaking, be admitted to make the law to us, as well as to the courts below. By a single precedent, a single decision, we might not be governed, while they, generally speaking, would be. By a course of precedents, a course of decisions, and the long-prevailing opinion of the judges and of the profession, we, as well as they, must be bound; and it would be very difficult to suppose a case of error so clear, so manifest, as would suffice to make us deviate from a course long and generally pursued by the courts below." [272]

In the courts of another state, or of another system or jurisdiction, decisions of inferior courts are but little esteemed, for the reason that they may be reversed or modified by their own court of last resort.[273] But considerable weight is sometimes allowed to a judgment of a lower court of another system, when its reasoning is such as to commend its conclusions to the mind of the court before which it is cited; and this is particularly the case where the decision has been approved or adopted by the court having appellate jurisdiction over the court which rendered it and by the higher courts of other states.[274] And the decision

[272] O'Connell v. Queen, 11 Clark & F. 155, 328.

[273] See illustrations in the following cases, containing comments on the decisions of inferior courts of other states: Saveland v. Fidelity & C. Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863; Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101; Kauffman v. Peacock, 115 Ill. 212, 3 N. E. 749; Supreme Council of American Legion of Honor v. Green, 71 Md. 263, 17 Atl. 1048, 17 Am. St. Rep. 527; Marx v. Croisan, 17 Or. 393, 21 Pac. 310.

[274] German Nat. Bank v. Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247.

of even a nisi prius court in another state, if well considered and soundly reasoned, may strongly influence an appellate court, in the absence of any more direct or authoritative precedents. In illustration, we may refer to a case in which the Supreme Court of Pennsylvania, being called on to construe an entirely novel statute, was much at a loss for precedents, but referred approvingly to a recent decision of the Superior Court of Cincinnati and to judgments in the courts of first instance in Philadelphia, and really based its judgment on these authorities.[275] And it should be observed that the American courts, in the absence of binding precedents, are apt to be much more strongly influenced by decisions of the inferior courts of Great Britain than by decisions of courts of similar rank in other states. Numerous instances might be cited in which cases of first impression have thus been ruled in accordance with the doctrine of an English case, though only a nisi prius decision, where its judgment has not been abrogated by statute or reversed by the higher courts of that country.[276]

Finally, it must be noticed that the pre-eminence of certain of the great judges gives a weight to all their rulings, even when made in the inferior courts. Thus, in England, great respect is paid to any decision of Coke or Mansfield, even though made at nisi prius, and in this country a similar authority is conceded to the decisions of Marshall and Story on circuit. Also, the decisions of the inferior federal courts are generally more respected than those of the lower courts of another state.

[275] Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201.

[276] See, for instance, Conners v. Burlington, C. R. & N. R. Co., 71 Iowa, 490, 32 N. W. 465, 60 Am. Rep. 814; Hoppe v. Byers, 60 Md. 381.

OPINION OF THE COURT

41. In cases where a former decision is cited, not as a binding precedent, but as persuasive authority, its value depends greatly upon the character of the opinion pronounced in the case, being enhanced by sound, acute, and logical reasoning, by internal evidence that the case received the careful consideration of the court, and by a copious citation of pertinent authorities, and being diminished by the absence of any of these characteristics.

42. An anonymous opinion, or one rendered "per curiam," is seldom entitled to much weight or consideration as a precedent, unless it deals with some familiar or well-settled principle of law.

Criticism of Opinions

As between a higher and a lower court of the same system, the decision of the former is binding and conclusive on the latter, as a precedent, in all cases where it is applicable, without inquiry into the soundness of the views expressed or the correctness of the decision rendered. But when a court is asked to reconsider a rule formerly established by its own decisions, or when a decision of one court is cited as an authority to another court of a different state or system, the degree of respect to be paid to the precedent will depend largely upon the care and thoroughness with which the case was considered, and the logical correctness and legal soundness of the reasoning which led the court to its conclusions. To test a decision in these respects we are to look to the reported opinion of the court. There are numerous particulars in which criticisms may be passed upon such opinions, whereby the authority of the decision may be impugned in the respects above indicated.

Defective and Illogical Reasoning

If the opinion embraces no more than a mere statement of the conclusions reached by the court, or a direction as to the disposition to be made of the case, without anything

to indicate the course of reasoning which induced the decision to be made, it is in general unsatisfactory and not entitled to much weight as a precedent. For in that case we are unable to judge whether the case received a thoughtful attention and thorough investigation, such as to make the decision the result of the deliberate and reasoned judgment of the court. But there are exceptions to this principle. For instance, in those cases where the decision turns upon the application of a well-known rule of law to a particular state of facts, the mere judgment of the court that such rule was or was not applicable, without argumentation, may be weighty as a precedent for the decision of a future case based upon the same or similar facts.[277] If the reasoning of the court is given in the opinion, but is found to be faulty, the force of the conclusion reached, as a precedent, is weakened. Faults of this kind may include violations of the ordinary rules of logic, as where a conclusion is based upon unfounded assumptions or is drawn from insufficient premises, or may consist in the disregard of the principles of legal dialectics, as where a rule is attempted to be supported upon a false analogy or a misconception of the spirit and policy of the law. Courts are not sparing of their criticism of opinions on this point. As, for instance, "many of the statements contained in that opinion are of doubtful soundness, and the entire opinion is so inharmonious and inconsistent as to make the case one of questionable authority." [278] "The case is in point, but rests on no authority and very poor reasons." [279] So also, note the lan-

[277] See, for instance, Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295, where it was said: "We are not without decisive authority in our own state. The unreported case of Sedgwick v. Sedgwick, decided at June term, 1844, was a case similar to the one at bar. And the Court of Appeals decided that the subsequent marriage and birth of a child did revoke the will, and they affirmed the decree of the orphans' court refusing it probate. No opinion was filed in that case, although a large amount of property was involved, and the case was argued by some of the most eminent counsel in Maryland. But they did flatly decide the question by a decree, declaring the will revoked by a subsequent marriage and the birth of a child."

[278] Garmire v. State, 104 Ind. 444, 4 N. E. 54.

[279] Hiles v. Hanover Fire Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. Rep. 637.

guage attributed to Chief Justice Willes in criticising a decision of Lord Harcourt, as follows: "I shall only say this much of it at present, as it was a judgment given by him without any reasons and directly contrary to the strongest reasons that he himself had laid down but about a week before in the same case, it is a case that has no weight with me; for I will not be influenced by any judgment that is founded either on fear or favor." [280] This objection of bad or unsound reasoning is particularly liable to occur where the case decided was one of first impression. "A decision may be wrong as being contrary to reason. Where there is no settled law to declare and follow, the courts may make law for the occasion. In so doing, it is their duty to follow reason, and, so far as they fail to do so, their decisions are wrong and the principles involved in them are of defective authority. Unreasonableness is one of the vices of a precedent, no less than of a custom and of certain forms of subordinate legislation." [281] Again, where the courts are at variance as to the springing of a liability out of a given state of facts, and those courts which recognize the existence of the liability put their decisions to that effect on different grounds, "the absolute inability of the various courts to center upon any particular principle as a common ground for such a liability" shows that it ought not to be recognized either in reason or on authority.[282] Yet such is the natural conservatism of the legal mind, and so great the respect for precedent, that eminent judges have often preferred the stability of a rule of law to its reasonableness. Thus, Lord Hardwicke is reported to have said: "When rules are laid down in books, though they may not have much reason in them, yet it is sufficient they are known; and I shall be very tender in setting up my opinion in contradiction to them." [283]

Length and Character of Opinion

More respect is naturally paid to an opinion in which the questions of law involved are fully and amply discussed,

[280] Welles v. Trahern, Willes, 240.
[281] Salmond, Jurisprudence (2d Ed.) p. 166.
[282] Osborne v. Cabell, 77 Va. 462.
[283] Newcoman v. Bethlem Hospital, 1 Ambl. 8.

and in which the conclusions reached are supported by an exhaustive examination of the legal principles concerned, than to one in which the court is contented with a hasty review of the case and a brief statement of its views. In the latter case, there is always ground to suspect that the question did not receive that careful and thorough investigation which alone can produce an entirely satisfactory precedent for the determination of other similar cases. Hence it detracts from the value of a decision as an authority that the court gave no reasons for its decision, merely saying "we have no doubt" that such and such is the case.[284] Where the question is a doubtful one, on which the courts of various states have materially differed, such a decision has very little weight when placed in the scale against an exhaustive and well-considered opinion from another jurisdiction, as witness, for example, the following remarks of the court in Alabama, in a case in which it declined to follow a precedent from another state: "The power of the courts to this end is denied in Illinois in a very meager, unreasoned, and unsupported opinion of the Supreme Court, in which the subject is dismissed with the assertion that 'the court had no power to make or enforce such an order.'" [285] Yet mere diffuseness adds nothing to the strength of an argument in law. A rambling discussion may show that the court failed to grasp the precise questions which it was called upon to solve; while a well-reasoned opinion, confined strictly to what is necessary to be decided, gains force from its terseness. It should also be remarked that when an opinion merely recognizes and reaffirms an already accepted rule or principle of law, it is respected as a cumulative authority on that point, although there may be no review of the reasoning which led originally to the establishment of the doctrine. And of course it should not be forgotten that it is the decision and not the opinion which makes the precedent; and an important principle may be extracted from the mere judgment in the

[284] In re Village of Ridgefield Park, 54 N. J. Law, 288, 23 Atl. 674.
[285] Alabama G. S. Ry. Co. v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764.

case, though the grounds or reasons for it were not set forth at length. Thus, the Supreme Court of the United States has pointed out that the authority of one of its decisions, upholding a rule of an inferior court, is not lessened by its omission to give the grounds for its decision, as this omission does not give ground for an inference that it had doubts as to the validity of the rule, but rather that it regarded the grounds of challenge to such validity as unfounded.[286]

Citation of Authorities

Since the great majority of the cases now coming before the courts are not cases wholly of first impression, but call only for the application of the established rules of law to particular states of fact, the character and applicability of the authorities cited in an opinion is an important point to be considered in judging of its value as a precedent. If the opinion makes no reference to decisions of the courts or other authorities, where such authorities could have been discovered and applied, it is not only open to the criticism that the court could not have given the question a careful examination, but it also loses the force which it might have acquired by the support of pertinent precedents, either concurring in the conclusions reached or conducing thereto. The courts, therefore, are apt to hold in very light esteem an opinion which omits to notice the extant decisions on the same point or subject,[287] unless it is extraordinarily persuasive in itself as a piece of original reasoning.

[286] Fidelity & Deposit Co. v. United States, Use of Smoot, 187 U. S. 315, 23 Sup. Ct. 120, 47 L. Ed. 194.

[287] See, for instance, the following criticisms: "But the decision in Crooks v. Allan [5 Q. B. D. 38] is by a single justice and no cases are cited in the opinion." Wamsutta Mills v. Old Colony Steamboat Co., 137 Mass. 471, 50 Am. Rep. 325. "No authority, however, is cited by either of these eminent jurists in support of the proposition advanced by them, nor does either discuss it on principle, but seems to have taken it to be conceded as a matter of course." Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641. "We have no access to the full report of this case, and cannot tell by what authorities it was supported." Daughtery v. American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435.

But an opinion which reviews and discusses all or nearly all of the decisions, at home and abroad, on the question at issue, approving some, criticising others, and distinguishing still others, and giving the reasons therefor, and which thus shows that no important precedent escaped the notice and consideration of the court, is invariably treated with the greatest respect, and very often accepted as conclusive.[288] For a well-reasoned opinion is like a strong wall; but a well-reasoned opinion fortified by the citation of well-considered and applicable authorities is like a strong wall made more firm by the support of buttresses. On the other *hand, if* the opinion shows that the court relied on the au*thority* of decisions which are found to be themselves ill-considered, obsolete, discredited, or overruled, its decision loses force in proportion as it depended upon such unreliable sources. And the same is true if the decisions relied on can be shown to have been misunderstood by the court citing them. If the court bases its conclusions wholly or in part upon what it supposes to have been the doctrine of a former case, whereas such former case, in reality decided no such thing, then, in so far as the judgment was influenced by the mistaken conception of the former case, it is without value. And this criticism is also properly to be made where the cases cited and relied on presented materially different facts, so that they constituted no true precedent for the decision about to be made, but rather misled than guided the court.[289] Still, it may be that the reasoning of the judge is itself so sound, logical, and consistent, that the opinion may be entitled to great respect, nothwithstanding the citation of inappropriate or untrustworthy cases. And in particular, with reference to reliance placed upon overruled cases, it must be noticed that the effect is different according to

[288] See, for example, Vick v. Gower, 92 Tenn. 391, 21 S. W. 677; Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472.

[289] Carr v. Eel River & E. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354.

whether the discredited case was ruled by the same court or proceeds from a different jurisdiction. Except as to the construction of local statutes and some other such matters, a decision from another state is not conclusive but only persuasive authority; and the fact that it has been overruled by the court which rendered it may cast a heavy cloud upon it, but does not necessarily destroy its persuasiveness. Let it now be supposed that the case of A. v. B., decided in New York, has been approved and followed in a case of C. v. D. in Illinois, and that afterwards A. v. B. is overruled in New York. It will not necessarily follow that C. v. D. must be regarded as discredited in Illinois. For the court in the latter state is perfectly at liberty to consider whether the original decision or that which overruled it is the more worthy of respect and adherence; and if it should be of opinion that A. v. B. was rightly decided, and that the decision which overruled it was wrong, it will be justified in adhering to its own former decision.

While no court is bound to notice or refer to all the decisions which may have been made on the general subject to which its decisions relates, yet, as it gains force by referring to pertinent and well-reasoned concurring authorities, so also it loses force if it overlooks contrary decisions made at home or abroad. If there are, in the same state or system, previous authorities which are inconsistent with the conclusion at which the court arrives, it is a safe inference that no exhaustive search was made for illumination upon the question at issue; and in this case the force of the authority is further diminished by the reflection that the authorities, if they had been discovered and referred to, would have put the court to the necessity of either overruling its previous decisions or else deciding the case at bar in a different manner.[200] If a particular decision is opposed to the preponderance of authority in other jurisdictions,

[200] A decision is not of high authority when it is found that it was contrary to a prior decision of the same court, which earlier case was unknown to counsel by whom the later case was argued and not noticed by the court itself. Smith v. Doe, 2 Brod. & B. 473, 593.

but is consciously so, it may be respected for the vigor or acumen of its reasoning, and may even be influential in bringing about a change of opinion. But if it is rendered without any reference to the fact of such a body of opposing authorities, and without anything to show that the court was even aware of their existence, it is entitled to no respect. For it is possible that if the court had been directed to the authorities contravening its own view, and had carefully considered them, it might have been influenced to an entirely different conclusion. But of course this remark does not apply to a case where the court merely follows a settled line of precedents in its own state, or decides a question of purely local law.

If it should be found that the court had taken its authorities at second hand, by relying upon the statement of them made in text-books or digests, and that they are really inapplicable or erroneous, the opinion will lose force, not only by reason of the citation of worthless cases, but also for the evidence of a lack of care and thoroughness which such a method of proceeding would disclose. Reliance placed upon the opinions of text-writers or commentators, where such opinions are private and personal and not founded upon the authorities, will naturally add no force to the opinion, even if it does not detract therefrom.

Anonymous and Per Curiam Decisions

An anonymous opinion (that is, one not professing to have been written by any particular judge, but to be promulgated by the whole court, or "per curiam") is not entitled to the highest respect as a precedent. Such per curiam opinions are very seldom given forth in any case which is considered by the court to possess inherent difficulty or great importance. Hence they indicate that, while the court gave sufficient attention to the case to decide the rights of the parties with justice and to its own satisfaction, it did not consider that the case demanded an exhaustive discussion of legal principles or a detailed examination of the authorities. Moreover, the natural inclination of a judge writing a per curiam opinion is to devote to it less care and elaboration than would be demand-

ed of him by an opinion bearing his own name. Still, such an opinion is as much a judgment of the whole court as any other. And it may frequently be used with effect as showing that the principle of law which it applied to the facts of the case, and in support of which it is cited, was deemed by the court to be so plain or so well settled as to require no discussion or elucidation. Thus, in Pennsylvania, it is judicially laid down that a per curiam opinion is the opinion of the court in a case in which the judges are all of one mind, and which is so clear that it is thought unnecessary to elaborate it by an extended discussion. Such an opinion is not entitled to less weight, as an authority upon the questions involved, than any other.[291]

Dissenting Opinions

These may or may not detract from the force of a decision as a binding precedent, as will be explained in the next section. It is important here to consider the effect of a case in which one or more dissenting opinions were filed, when it is cited as a persuasive authority in another state. In these circumstances, the value of such an opinion will depend very largely upon the number of judges who dissented, upon their personal reputation for learning and ability, and upon the force and character of the dissenting opinion as compared with that of the majority. It will often happen that a dissenting opinion is so well-reasoned, so well sustained by authorities, and so much more in harmony with the spirit and reason of the law, as to destroy, almost wholly, the value of the majority opinion as a precedent. And in extreme cases it may even come to pass that the dissenting opinion will be cited and respected as an authority, while the majority opinion is discredited.[292]

[291] Clarke v. Western Assur. Co., 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821. And see Letzkus v. Butler, 69 Pa. 277; Dowling v. Salliotte, 83 Mich. 131, 47 N. W. 225.

[292] "The nearest case is Barefield v. State, 14 Ala. 603, and of that case we remark that the reasoning of the dissenting judge is to us more satisfactory than that of the prevailing opinion." People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700. "The dissenting opinion of Ruffin, J., is in our opinion a complete reply to this

UNANIMITY AND DISSENT; ABSENCE OF JUDGES; CONCURRENCE IN RESULT

43. It detracts from the force of a precedent that the judgment was given by a divided court, or that one or more of the judges dissented from the conclusions reached by the majority; that some of the judges, on account of absence or for other cause, took no part in the decision of the case; or that the judges, or some of them, while concurring in the general result, differed as to the reasons on which the judgment should be founded.

Unanimity and Dissent

An opinion concurred in by the whole bench is naturally of higher rank and value than one from which one or more of the judges dissent.[292] But the exact degree in which the force of a precedent is diminished by the want of unanimity among the judges depends upon various circumstances, and primarily upon the question whether it is cited in a subsequent case as an absolutely binding authority, as one which should be respected on the principle of stare decisis, or as possessing only persuasive authority.

In the first place, as respects the lower courts of the same state or system, a decision accompanied by a dissenting opinion is as conclusive as any other. As the majority

position," and, after quoting from this opinion, "this argument seems to us unanswerable. It at least never has been answered in any case we have seen." Brooks v. Black, 68 Miss. 161, 8 South. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259. "As to this particular matter, I must confess that, notwithstanding my very high respect for the very able court rendering these decisions [New York] I am more impressed with the reasoning of Edwards, J., in the dissenting opinion in Hull v. Carnley, 11 N. Y. 510, than I am with the reasoning in the opinion of the majority." Cone v. Ivinson, 4 Wyo. 203, 33 Pac. 31.

[292] Bentley v. Goodwin, 38 Barb. (N. Y.) 640; Jones v. Sparrow, 5 Durn. & E. 257; Chicago, K. & N. Ry. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. 472; Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495.

rules, such a decision is the decision of the court, not merely the opinion of the majority judges, and therefore settles the law conclusively for all those courts which are subject to its appellate jurisdiction. No nisi prius judge would be entitled to disregard such a precedent merely because it was given by a divided court, nor because his personal opinion of the law coincided with the views expressed by the minority of the judges.

As respects the court which rendered the decision, and when it is cited and relied on, on the principle of stare decisis, a similar rule is to be observed. That is to say, the decision cannot be disregarded or treated as if it had not been made, merely because the judgment was given by a divided court. Notwithstanding that fact, it is the decision of the court, and must stand as a precedent until it is overruled.[294] As remarked by the New York Court of Appeals: "The doctrine of the Story Case, although pronounced by a divided court, must be considered as stare decisis upon all questions involved therein, and as establishing the law, as well for this court as for the people of the state, whenever similar questions may be litigated." [295] Yet it is undeniable that such a decision is more open to attack and more easily overruled than a unanimous opinion, both because the fact of dissent weakens the precedent and because, if the dissenting judges remain on the bench, they will naturally retain their opinion and be ready to vote for a reversal of the decision. Hence it is an accepted principle that an appellate court may overrule its own former decision when it was rendered by a divided court, on a more or less doubtful question, and when the court, at a subsequent time, and on a more critical examination of the matter and mature deliberation, is thoroughly satisfied that the original decision was unsound in law.[296] But this is not often done in the same controversy. A very salutary rule laid down by

[294] Feige v. Michigan Cent. R. Co., 62 Mich. 1, 28 N. W. 685; Lewis v. Riggs, 9 Tex. 164.

[295] Lahr v. Metropolitan E. Ry. Co., 104 N. Y. 268, 287, 10 N. E. 528, 530. And see Barnes v. Ontario Bank, 19 N. Y. 165.

[296] Hopkins v. McCann, 19 Ill. 113; Gilbert v. State, 116 Ga. 819, 43 S. E. 47; Hill v. State, 112 Ga. 32, 400, 37 S. E. 441.

the court in Michigan is that a decision by a majority of the court must be regarded as conclusive, and that a change in the composition of the court will not warrant a re-opening of the controversy, unless the court itself orders a reargument.[297] And even in subsequent independent cases, the mere fact of disagreement among the judges who gave the former decision is not per se ground for overruling it. It lays it open to attack, as we have said, and furnishes opportunity for an argument against the correctness of the decision, but the question whether it shall be overruled depends entirely on the view which the court may afterwards take of its legal soundness, and that view may be influenced by the ratio between the majority and minority judges in the former decision, the general professional opinion as to its correctness, the fact of its having been followed (or not followed) in other like cases, the way the decision is regarded in other states, and numerous other considerations. Thus, in Massachusetts, it is said that the doctrine of stare decisis should be applied to a decision concurred in by four out of five justices, where the question was carefully considered and argued, where there has been no change in the trend of judicial opinion unfavorable to the decision or the grounds of it, and where it has been favorably received by the legal profession.[298] On the other hand, where the decision was rendered by a bare majority of the court, and has not been followed in any other case, and the court is afterwards of opinion that the construction which it put upon a statute was erroneous and contrary to public policy, the decision may be overruled.[299]

But it is otherwise where the decision is cited as a persuasive authority in a court of another state or jurisdiction. Here the fact of dissent is always taken into account as affecting the value of the precedent, and undoubtedly and

[297] McCutcheon v. Homer, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212.

[298] L. D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236.

[299] Postal Tel. Cable Co. v. Farmville & P. R. Co., 96 Va. 661, 32 S. E. 468.

invariably withdraws from it some of the force which it might otherwise possess.[300] And, as pointed out in the preceding section, it may even happen that a court of another state will reject entirely the opinion of the majority, and accept that of the dissenting judge or judges as a correct exposition of the law.

It should also be noticed that if the dissent extends only to some particular point or points, it has no effect upon those other points, material to the issue, upon which the court is not divided. It may even tend to strengthen the opinion as to those points, by showing that full and careful deliberation was given to the entire case. Thus it has been stated by the Supreme Court of the United States, in reference to one of its decisions, that where three of the judges, who were in the minority on the general question in the case, concurred in an opinion given by one of the four majority judges in relation to another question, the principles established therein may be considered as no longer open to controversy, but as the settled law of the court.[301]

Judges Absent or Not Participating in Opinion

It sometimes happens that one or more of the judges of an appellate court will refrain from joining in the decision of a case or in the opinion, either because they were not present at the argument, or because they considered themselves disqualified from passing judgment on the case, by reason of having been formerly of counsel in the litigation or as being personally interested in the result. This circumstance should not ordinarily weaken the force of the decision as an authority. Even though the judgment should thus be rendered by a bare majority of the court, it still stands as the decision of the court, not of the individual judges. The case is different from that of a dissent. For it cannot be known whether the judges who abstained from participating in the decision would have entertained a

[300] See, for instance, Wallace v. Central Vt. R. Co., 138 N. Y. 302, 33 N. E. 1069; Peeler v. Peeler, 68 Miss. 141, 8 South. 392; Schultze v. Alamo Ice & Brewing Co., 2 Tex. Civ. App. 236, 21 S. W. 160.

[301] Boyle v. Zacharie, 6 Pet. 348, 8 L. Ed. 423.

different opinion from that of the rest, or would have concurred in the conclusions reached by them.[302] But there are some rare instances in which there are both dissenting opinions given and an abstention on the part of others of the judges from any participation in the decision. When this combination occurs, the judgment may actually be cast by a minority of the court; and although such a judgment is as binding on the parties concerned, and on the inferior courts of the same system, as a uanimous opinion would have been, yet it is generally regarded as of less weight and value as a precedent.[303] For example, the celebrated "Chicago Lake Front Case" was decided on the opinion of four out of the nine judges who compose the Supreme Court of the United States, less than a majority. The reason was that two of the judges, on account of interest, took no part in the decision of the cause, and three dissented.[304]

Judges Concurring in Result Only

If all or a majority of the judges concur in the result (as, that a new trial should be granted, that the judgment of the court below should be affirmed, that the writ prayed

[302] In Delaware, where the report of a case decided by the Court of Errors and Appeals does not show that one of the judges expressed any opinion, the Superior Court will presume that he concurred on the grounds on which the writer of the opinion based the decision, although its members may know that he afterwards entertained different views. State v. Green, 1 Pennewill, 63, 39 Atl. 590.

[303] In Virginia, it is ruled that where, in the absence of two justices of a bench of five, a case is decided on the written opinion of two justices, and the concurrence of the third in the result only, and it is probable that the latter assents on other grounds, the principle on which such written opinion is based is not a precedent under the rule of stare decisis. Whiting v. Town of West Point, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750. And see Chesapeake & W. R. Co. v. Washington, C. & St. L. R. Co., 99 Va. 715, 40 S. E. 20. In West Virginia, under the constitution, a decision is not binding authority in any other case unless concurred in by at least three judges. See Bruff v. Thompson, 31 W. Va. 16, 6 S. E. 352. As to a similar constitutional provision in California, see Luco v. De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543.

[304] Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

should issue) but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result.[305] For if one judge announces certain rules, principles, or doctrines of law as the reasons which incline him to the decision to be made, and another is induced to the same end by a different view of the rules, principles, or doctrines, it cannot be said that any one of the rules considered, or any one of the steps in the reasoning, has received the assent of the court, but only that it is supported by the opinion of the particular judge.[306] There is always, however, in the case some ultimate element of decision, the "general result," which commands the assent of the court as a whole or at least of the majority of the judges. And so far as this goes, it will constitute a precedent for a similar disposition of a similar case arising in the future. Thus, in a case in New York it was said: "It is urged in favor of a reversal that the judges of this court were not unanimous in pronouncing the former decision, and that those who concurred in the result were inharmonious in the reasoning which brought them to the same conclusion. However this may be, the precise question then passed upon was the very one now before us. There was but one point then before the court, and there is but one now. * * * The modes of reasoning among the judges

[305] City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56; Mapes v. Burns, 72 Mo. App. 411; State ex rel. People's Bank of Greenville v. Goodwin, 81 S. C. 419, 62 S. E. 1100.

[306] A remarkable instance of this is found in the case of Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088. This was the first of the decisions dealing with the political status of the "insular possessions" of the United States, acquired at the close of the Spanish War. The judgment of the court was announced by Mr. Justice Brown, who filed an opinion. A separate opinion was filed by Mr. Justice White, who concurred "in the result," but for "reasons different from, if not in conflict with, those expressed in that opinion." Messrs. Justices Shiras and McKenna concurred with Mr. Justice White. Another opinion was filed by Mr. Justice Gray, "agreeing in substance," but not in all details, with the opinion of Mr. Justice White. Finally, the Chief Justice and Mr. Justice Harlan filed separate dissenting opinions, with whom concurred Mr. Justice Brewer and Mr. Justice Peckham.

may have been different, but their conclusion was united and single." [307] It may also sometimes happen that the opinion of the court (that is, of the majority) will be written by a judge who dissents from it or who concurs only in the general result. In this case the authority of the decision is diminished by the consideration that the personal views of the author of the opinion will almost invariably interfere with his full and forcible statement of the opinions of the rest of the judges.

EFFECT OF PENDING APPEAL OR REHEARING

44. A decision from which an appeal is pending in a higher court should be followed, on the principle of stare decisis, until it is reversed. But the grant of a rehearing in an appellate court suspends all the force of the original decision as an authority, until the final conclusion is announced.

Where, for example, a particular conclusion of law upon a given state of facts has been adjudged and announced by the court of last resort in a state, all the inferior courts of the state are imperatively bound to follow the decision as a precedent, and they are not released from this obligation by the fact that an appeal has been taken to the Supreme Court of the United States. For the decision is the law of the state until it is reversed; and it cannot be presumed that it will be changed as the result of the appeal, but on the contrary it must be presumed to be correct until the appeal is determined.[308] On a similar principle, where a suit is brought in a federal circuit court, involving the validity of municipal bonds, and is decided by the judge holding the court, and the case is taken to the Supreme Court of the United States on writ of error, and is there pending, and a subsequent suit, involving the same bonds,

[307] Oakley v. Aspinwall, 13 N. Y. 500.

[308] Rochester & G. V. R. R. v. Clarke Nat. Bank, 60 Barb. (N. Y.) 234.

is heard by one of the other judges holding the circuit court, the former judgment should be followed, notwithstanding a difference of judicial opinion, until the Supreme Court has passed on the questions involved.[809] But the case is altogether different where an appellate court grants a rehearing in a case which it has once decided. The effect of this is to reopen the argument, to take the case again sub judice, and to deprive the original decision of all force or effect as a precedent, until it shall be seen whether it may be reversed or modified by the conclusion finally announced in the case.[810] But when a rehearing is granted on one ground only, and denied on another, the decision as to the latter point remains binding as a precedent.[811]

REPORTS OF CASES

45. It is the decision in the case, and not the opinion of the court nor the report of it, that makes the precedent. Hence an unreported case may be cited as an authority if the actual decision can be shown from original sources.

46. If a report is relied on as evidence of the decision, it is essential, to give the case the highest measure of authority, that the report should be sufficiently complete and accurate to show clearly and indubitably the precise nature of the questions involved and the rulings of the court upon them. The value of a precedent may be materially weakened or even destroyed by the fact that the report of it is meager, obscure, or imperfect, or that two or more reports of the same case differ as to the facts involved or the principles laid down by the court.

[809] Norton v. Brownsville Taxing District (C. C.) 36 Fed. 99.

[810] Ex parte Whitley, 144 Cal. 167, 77 Pac. 879. And see Thomas v. Davis, 1 Dick. 304, where it was said of a case cited as a precedent that it "is no authority, being now sub judice."

[811] Mayo v. Board of Com'rs of Town of Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

47. The decisions of the higher courts are commonly published in volumes issued under authority and prepared by reporters designated by the court. But it adds nothing to the weight of a precedent that it has been thus officially reported, nor is its effect destroyed by its omission from such official reports, provided a complete, accurate, and skillfully prepared report of it can be found elsewhere. But reports of cases in the newspaper press are not received or heard in the courts, unless under very rare and exceptional circumstances.

The precedent in any given case is made by the decision of the court in that case. The evidence of the decision is the report of the case. It is true that in a strict sense the written opinion of the court, if any was filed, is the best evidence of the decision made. But the original opinions, or authenticated transcripts of them, are now very seldom cited in our courts. Hence in a general sense we may say that it is by the reports that precedents are brought to the knowledge of the profession and made available for the purposes of litigation. Still it is important to remember that it is the ruling of the court—the disposition which was made of the case—which establishes the precedent, and not the report. Hence, even though a given case should never be reported at all, and even though there should be no written opinion of the court, still the fact that such a case was decided in such a manner is a precedent for a similar disposition of a similar case. It may be difficult, in that event, to prove the fact of the former ruling. But it is not unusual for counsel to refer the court to its own rulings made in cases alleged to be similar to the case on trial, where such rulings rest only in the recollection of the court and counsel. Courts have also been known to decide cases before them on the authority of an unreported but remembered prior decision. And in the English courts, instances are on record where a manuscript report of a case, in the possession of the judge or of counsel, has been pro-

duced, cited, and relied on.[212] In some of the states, it is the rule or custom that only those decisions of the court of last resort shall be included in the official series of reports as are specially designated for that purpose by the judges. None the less, all the decisions are precedents, and may be cited and relied upon, unless some rule of court restricts the sources of information which may be referred to in briefs and on arguments.

Those volumes of reports which are prepared by the reporters appointed by the courts, and published under authority, are commonly styled "official," and some of the courts of last resort prefer that their own decisions should be cited to them only from the official volumes. But there are many other reports of the decisions of most of the courts of last resort, some found in regular though unofficial series, others in legal journals and professional periodicals of various sorts. In the United States, in fact, there is at least one such system of law reports which includes prompt, full, and accurate transcripts of the decisions of the various federal courts and of the courts of last resort in all the several states. There are also excellent series of selected cases, now current, as well as series of reports dealing exclusively with the decisions upon some major branch of the law, such as railroads, corporations, bankruptcy, insurance, mining, etc.[212a] It is therefore usu-

[212] Thus, in Corder v. Morgan, 18 Ves. 344, a manuscript report of a case was cited at the bar and was referred to in the opinion as being "an authority precisely applicable." So in Preston v. Funnell, Willes, 166, the Chief Justice, speaking of a case cited to him from Salkeld's Reports, said: "But I have a fuller manuscript [note of the case] than the report in Salkeld."

[212a] The National Reporter System, published by the West Publishing Company, of St. Paul, Minnesota, includes two periodicals devoted to the decisions of the various courts of the United States, called respectively the "Supreme Court Reporter" and the "Federal Reporter," and seven other weekly issues, each devoted to a group of states, and bearing such geographical titles as the "Atlantic Reporter," "Pacific Reporter," etc. These contain very prompt reports of all the decisions of the courts of last resort in all the states, while the "New York Supplement" contains the decisions of the intermediate and inferior courts of a single state. Thus the entire body of current American case-law is made readily available

ally possible to find several entirely independent reports of any novel or specially important decision. They should, and commonly do, agree textually in setting forth the opinion of the court, while differing in the reporter's headnotes or syllabi, and sometimes in the comparative fullness or brevity of the statement of the facts. But bearing in mind that the decision establishes the precedent, and the report only evidences it, it will be perceived that nothing is added to the weight of a precedent by the fact that the account of the case is found in an "official" report. The question is always as to the accuracy, completeness, and reliability of the report, and the skill, judgment, and learning of the reporter. There is, in fact, no sanctity in an official report. It is always impeachable. It is no more than prima facie evidence of the decision in the cause, and if it is suspected of inaccuracy, recourse may always be had to the original opinion on file in the case, which is the best and final authority. Instances are not wanting in which courts have thus recurred to their filed opinions, to determine the exact scope of a precedent, and have found them to contradict the testimony of the official report, even, at times, commenting on the fact that a better report, or an entirely accurate report, of the particular case was to be found in some unofficial series or collection of cases.[812b] And in

in small compass. As these reports are founded on unimpeachable sources of information, and are prepared by highly trained specialists, after a uniform system, they are entirely trustworthy. The series of selected cases referred to in the text are the well-known "American Decisions," "American Reports," "American State Reports," and "Lawyers' Reports Annotated." All the citations of authorities in this volume, as well as in my other works, contain parallel references to the various reporters and series of cases above mentioned.

[812b] See, for example, Goodman v. Jamieson, 72 Misc. Rep. 32, 129 N. Y. Supp. 114, containing comments on the incorrect report of a certain previous decision in the 46th volume of the "Miscellaneous Reporter," an official report in New York, and the statement that the case was "correctly reported" in the 92d volume of the New York Supplement, an unofficial periodical mentioned in the preceding note. See, also, Howell v. Gruver (Kan.) 97 Pac. 467, as to an error in the official report of the case of McDonough v. Marten, 53 Kan. 120, 35 Pac. 1117.

Massachusetts it is officially declared that the law stated in trials before the full bench and carefully reported, though not contained in the regular reports, has the same force of legal precedent as the decisions of the full court on a bill of exceptions.[313]

When written opinions were not filed, and the report of the decision had to be made from hearing the argument and the deliverances of the judges, much depended upon the opportunities which the particular reporter enjoyed to gain a full knowledge of the case and of the judgment. But at present, when practically all the reports are founded on printed records and arguments and the written opinions of the courts, at least in the United States, this question is of little importance; and the value of the particular report will principally depend upon its completeness and the judgment of the reporter in stating the facts and pleadings and in making the syllabi or headnotes.

Since the exact value of a given precedent, and its exact scope, can be ascertained only by a complete understanding of the precise question or questions presented to the court, and of the rulings made thereon and the reasons by which they were supported, it is evident that the worth of a report, as evidence of the precedent, will greatly depend upon its completeness. Scanty, incomplete, or partial reports of cases are therefore discredited in the courts, not because the precedents which they established may not be entitled to respect and authority, but because from the nature of the evidence, it is not possible adequately to determine what the precedent precisely was.[314] This principle is of sufficient importance to be illustrated by quotations from some particular opinions in which criticisms of this sort have been advanced. Thus, for instance: "The report is miserably meager in its statement of facts. We

[313] Commonwealth v. Anthes, 5 Gray, 277.

[314] See Fonereau v. Fonereau, 3 Atk. 318; Carslake v. Mapledoram, 2 Durn. & E. 475; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 623, 630; Goodtitle v. Alker, 1 Burr. 143; Ex parte Crowe, 1 Mont. & Mac. 281; Ballard v. Tomlinson, 50 Law T. (N. S.) 230.

are wholly unable to say what weight attaches to the decision of the case, because we are in possession neither of the facts necessary to enable us to comprehend the consideration of the case nor of the opinion of the court showing by what process it arrived at its conclusion." [815] "The first of these cases is so meagerly reported that it is difficult to determine upon what precise grounds it was decided." [816] "The case is meagerly reported; the opinion is also without argument." [817] "The condition of the policy was not given in that case, and, as reported, it is of very little value in this connection, for the reason that we are left in considerable doubt as to what the case really was." [818] So, in a case before the Maryland Court of Appeals: "We have been referred to the case of British American Ins. Co. v. Joseph [9 L. C. 448], decided in the court of appeals for Lower Canada, which has been supposed to decide that a fire insurance covers the risk of spontaneous combustion; and, citing that case only, Mr. May, in his work on Fire Insurance, comes to the same conclusion. The Lower Canada case is certainly very imperfectly reported. The report is in French, and the court gave no opinion. It is by no means clear from the few facts that are stated that the spontaneous combustion did not originate in a heap of uninsured coal." [819]

Criticisms of this kind are not very often found to be applicable to modern reports of cases, at least when found in books of authority or in professional journals. And in America it is now the general custom of the judges to incorporate in their opinions a detailed recital of the facts involved in the case and on which the judgment must depend, either by way of introduction to the discussion of questions of law, or in groups as the various points are taken up for

[815] Hemingway v. State, 68 Miss. 371, 8 South. 317.
[816] Nelson v. Van Gazelle Mfg. Co., 45 N. J. Eq. 594, 17 Atl. 943.
[817] Vick v. Shinn, 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26.
[818] Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. 29, 20 Atl. 716.
[819] Providence Washington Ins. Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314.

consideration. Also they make a practice of noticing in detail at least the more important of the precedents cited by counsel. Hence it is now seldom necessary for a reporter to prepare an independent statement of the facts or a summary of the briefs of counsel. Still less is it necessary or usual to quote or epitomize the oral argument. But it was very different in the earlier history of the English law, and many of the cases in the older volumes of the English reports are open to the objection of insufficient reporting, and are an unsafe reliance, for the reason that the arguments of counsel and the oral decisions of the courts are so imperfectly narrated that it is difficult to ascertain the precise nature of the problem before the court for adjudication.[320] The same observation applies to that form of report which attempts merely to give a synopsis of the decision, without the full opinion of the court, or a bare statement of the rule of law supposed to be established or applied. Since the language of the judges, and indeed the decision itself, is always to be restricted to the very needs of the case before them, and cannot be relied on as a precedent except in so far as the decision was necessary to the determination of that case, it is very evident that such epitomes may embrace too broad a generalization or lay down a rule of law in terms much wider than the facts of the case would warrant.

It is principally for this reason that reports of cases in the newspaper press are not regarded as of high authority or worthy of much reliance. They cannot be expected to recount all the features of the case with the accuracy and detail of a professional report, and moreover, they are seldom, if ever, made by trained and skilled reporters. In England it is a practically invariable rule that newspaper reports of cases cannot be cited at all in the courts. Thus,

[320] See, for instance Davis v. Sladden, 17 Or. 259, 21 Pac. 141, where it is said: "Lord Northampton's Case, 12 Coke, 134 (decided in the star chamber in 1613) seems to give some sanction to the appellant's claim; but that case has not been generally followed, either in England or in this country. More than that, the book containing it is one of questionable authority." Much valuable learning on the character and reliability of the older reporters is collected in the work of John William Wallace on "The Reporters."

Lord St. Leonards is reported once to have said: "Every man is and must be left at liberty to go into court and report what he pleases. The newspaper press has, and will continue to have, that privilege. No judge could properly refuse to hear a case quoted by the bar, but a judge would not, upon a law point, allow a newspaper report to be quoted, nor would he act upon an important decision quoted from a report hastily published, without further examination."[321] In America, while a court would not refuse to listen to such a report, if no other report of the case could be discovered, yet it would not be admitted to possess authority or to furnish fully satisfactory evidence of the precedent established by the case reported.[322]

If the same case is reported by several reporters, or in several series of reports, and if the reports differ, in respect either to the statement of the case or the rulings made by the court, the authority of that case as a precedent is diminished, by reason of the conflicting evidence as to the points decided. In such circumstances, it is sometimes possible to discriminate between the different reporters, conceding a higher degree of authority to one than to another, and sometimes the intrinsic evidence will show that one of the reports is more complete or more credible than the others. But unless such a distinction can reasonably be made, the authority of the case suffers.

[321] Daniel, History of the Law Reports, p. 101.

[322] Townsend, in his edition of Ram on Legal Judgment, p. 173, says: "The writer once cited a decision of Judge Nelson from a newspaper report, and the court [New York Court of Appeals] not only listened to it, but referred to it in the opinion, and stated a concurrence with 'the views ascribed to Mr. Justice Nelson.'" Stevens v. Hauser, 39 N. Y. 305.

PRECEDENTS OBSOLETE OR LOCALLY INAPPLICABLE

48. Precedents may become obsolete, and they are not to be inflexibly followed by the courts when the reasons on which they were founded have ceased to exist, in consequence of changed conditions in the social or economic world, but should rather be modified or adapted to present exigencies, or disregarded altogether.

49. Precedents founded upon the conditions prevailing in the state or country where made—whether geographic, climatic, social, economic, or political—cannot be followed in another state or country where they are entirely inapplicable because of different local conditions, but new rules must be framed to suit the conditions.

The doctrine of stare decisis is balanced by the principle, not less venerable, that when the reason for a rule of law ceases the rule itself also ceases to be obligatory. The fundamental reason for every judicial decision must be the effectuation of justice as between man and man, and its worth and value as a precedent must ultimately be measured by the degree in which it accomplishes this object. Now the principles of justice are immutable, but its determination and application to the special case may depend very greatly upon the wants and habits of the particular community at the particular time, or upon the existing state of society, or stage of civilization, as characterized by a very numerous and varied set of conditions. When these change, the law must change with them. This is effected directly through the enactment of new laws by the legislative bodies, and indirectly through the action of the courts, in moulding and shaping ancient rules to meet new exigencies. For the law is a progressive science, and fulfills its functions only as it keeps pace with the spread of knowledge and the evolution of society. In this way precedents,

once of the highest authority, may come to be utterly disregarded, because outgrown. Where the decisions in ancient cases depended upon the existence of a state of society which is now obsolete, or upon views of public policy or the policy of the law which have now given place to entirely different opinions, their authority should be held to have evaporated, and it is not incumbent on the courts to submit to their doctrines.[822]

The books are full of instances in which this principle has been recognized. Thus: "It is one of the noblest prop-

[822] In re Hunt, 81 Me. 275, 17 Atl. 68; Jennings v. State, 13 Kan. 80; Caples v. State, 3 Okl. Cr. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033. "While the rule of stare decisis is the great safety of rights subject to judicial decision, maxims and regulations fitted to a former state of society and government are not to be preserved and forced into an unnatural application, when and where the very conditions necessary to them when established have long since passed away." Faris v. State, 3 Ohio St. 167. See, also, Kightly v. Birch, 2 Maule & S. 533, where Lord Ellenborough overruled an early case, saying that it had had its day and that it was time it should cease. Attention is also directed to an interesing editorial in "The Outlook," of December 17, 1910, from which we quote as follows: "The principle is that, in a democratic community, law is not a fixed and determinate tradition, but a mobile and growing science of social relations. * * * The common law is not an inflexible rule established by ancient authority, to which all modern courts must conform. That is not its origin nor its end. The common law is a creation of the courts, and the modern judges are to carry on that process of creation by adapting to modern conditions the principles of social justice, as their predecessors on the bench adapted to previous conditions the principles of social justice. * * * Law ought to be mobile and to a certain extent fluctuating. It ought to be preeminently, in a democracy, a progressive science. From the traditions of the past we are to gain wisdom to guide us in the future, but we do not gain wisdom to guide us in the future if we impose these traditions on the present without regard to changed circumstances. The essential rights of person and property are always the same, but the measures for the protection of those rights are not always the same. * * * To ascertain by a study of the books what are the precedents which courts have set by their decisions in times past, and then apply them to times present, without any recognition of the changed conditions, is not the function of law courts in modern civilization. Their function is to deduce from the experience of the past the fundamental principles of social justice and apply them to the conditions of modern times."

erties of the common law that, instead of moulding the habits, the manners, and the transactions of mankind to inflexible rules, it adapts itself to the business and circumstances of the times, and keeps pace with the improvements of the age." [824] So, by Lord Chancellor Cottenham: "I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy." [825] So also, by Chief Justice Willes: "When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money as they are now. * * * The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied, both in courts of law and equity, now that personal estates are so much increased, and become so considerable a part of the property of this kingdom." [826] So it has been said by the Supreme Court of Connecticut: "It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed in the maxim, 'cessante ratione cessat ipsa lex.' This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons which, in the progress of society, gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances." [827]

Many examples of the application of this principle might be cited, but a few will suffice for purposes of illustration. Thus, the court in Virginia, with reference to the right of

[824] Lyle v. Richards, 9 Serg. & R. (Pa.) 351.
[825] Wallworth v. Holt, 4 Mylne & C. 635.
[826] Davies v. Powell, Willes, 51.
[827] Beardsley v. City of Hartford, 50 Conn. 529, 47 Am. Rep. 677.

lateral support of buildings, observes: "The doctrine contended for by the appellees, whether heretofore maintained as resting on an absolute rule of law, or on the ordinary principles of prescription, is at variance with reason and ought to be rejected. It may have been adapted to the age in which it was first announced in England, but is unsuited to the building of cities and towns in a progressive country like ours at the present day." [828] So, by another court in relation to another subject: "It is urged that a corporation cannot be indicted for keeping a disorderly house. Some of the earlier cases held that trespass or case would not lie against a corporation for a private nuisance, but that doctrine has long since been exploded. In early days, when corporate bodies were few, it was a matter of comparatively small consequence whether such an action could be maintained. In these days, however, when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they were not amenable to answer for such wrongs as subject natural persons to prosecution." [829] And indeed, it may be stated generally that old decisions should not be followed when they have become inapplicable by reason of business evolution.[830] And ancient decisions which are contrary to the law as now generally understood and practically applied by persons engaged in the particular business involved, as, commerce or navigation, are of small value as precedents, and if inconsistent with the general rules of law as settled by the concurrence of the courts of other states and systems, they may and should be overruled.[831] Much also depends on the changing social conditions and usages of the people. Thus, the court in Massachusetts, speaking of the rule that an act originally a trespass will cease to be such if condoned by a subsequent contract or license, says:

[828] Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581.

[829] State v. Passaic County Agr. Soc., 54 N. J. Law, 260, 23 Atl. 680.

[830] Old Dominion Copper, Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193.

[831] Barker v. Baltimore & O. R. Co., 22 Ohio St. 45, 61, 10 Am. Rep. 726.

"The law will readily imply a license for acts in accordance with the general habits of the community; and the objection stated in the Year Books that 'under that color, my enemy might be in my house and kill me,' scarcely retains its old force." [332] So again, it was formerly held in Massachusetts that probable cause for a criminal prosecution could not be made out, in an action for having instigated it maliciously, by showing that the defendant acted on the advice of a justice of the peace, the ground of the decision being that such magistrates were not learned in the law.[333] But thirty years later, the court refused to follow that decision, saying: "It is a question whether the judicial system of the commonwealth has not, since the time of that decision, been so changed and improved in respect to the learning, capacity, and standing in the community of the magistrates now intrusted with the power of issuing warrants in criminal cases, that the conclusion then reached ought to be now reconsidered." [334] So again, the Supreme Court of Kansas has refused to admit that "such indescribable myths as the English vendor's lien constitute a part of the law of the state." [335] Nor should we overlook a very able opinion of the Supreme Court of Alabama, in which was discussed the medico-legal test of insanity in criminal cases, and the rule laid down in the leading English case,[336] that the test was the capacity to distinguish between right and wrong, or to know the nature and quality of the act in question. Said the court: "In view of these conflicting decisions, and of the new light thrown on the disease of insanity by the discoveries of modern psychological medicine, the courts of the country may well hesitate before blindly following in the unsteady footsteps found upon the old sandstones of our common-law jurisprudence a century ago." [337]

[332] Hawks v. Locke, 139 Mass. 205, 1 N. E. 543, 52 Am. Rep. 702.

[333] Olmstead v. Partridge, 16 Gray (Mass.) 381.

[334] Monaghan v. Cox, 155 Mass. 487, 30 N. E. 467, 31 Am. St. Rep. 555.

[335] Simpson v. Mundee, 3 Kan. 173; Bunting v. Speek, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690.

[336] McNaghten's Case, 10 Clark & Fin. 200.

[337] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

But extreme radicalism in the development of the law is no less to be reprobated than hide-bound conservatism. It is not for the courts to fabricate new laws, under the guise of judicial decisions, in accordance with temporary fluctuations in popular feeling, or with their own notions of the wants and habits of the community. The guardianship of the public welfare is intrusted to the legislature, not the courts. The latter have to do with it only in so far as that they are bound to administer the existing laws justly and impartially. As was very prudently remarked by the court in Colorado, "If, since that opinion was written, the circumstances and conditions have so changed as to justify a return to the common-law rule on the subject, the legislature should so declare. Until such legislative declaration is made, we shall apply the doctrine of stare decisis." [338] And as to matters resting entirely on the basis of the common law, the courts should be very sure, before attempting a change, that there has been such a real, permanent, and fundamental change of conditions as to make the early precedents wholly inapplicable and obsolete. In such a case, and with regard to a doctrine of the common law, it was dryly remarked by the Supreme Court of California: "It is said that this rule was a legal fiction, and that, in the course of modern legislation and judicial decisions, it has been exploded. But it is no more a fiction than any other general principle of law, and we have seen no authentic account of the explosion." [339]

Precedents which are of unquestioned authority in the state or country where made may be entirely inapplicable elsewhere, and in that case possess no obligatory force. For the rules which they establish may be appropriate, and indeed necessary, to the particular conditions locally prevailing; but when the rule or doctrine is attempted to be transplanted into another jurisdiction, it may be found that an entirely different set of conditions are there to be considered, and that they are of such a nature that the appli-

[338] Nuckolls v. Gaut, 12 Colo. 361, 21 Pac. 41.

[339] Sesler v. Montgomery, 78 Cal. 486, 21 Pac. 185, 3 L. R. A. 653, 12 Am. St. Rep. 76.

cation to them of the rule or doctrine would result in hardship, injustice, or legal absurdity. In this event, the reason of the rule has ceased, and therefore, in accordance with the maxim already quoted, the rule itself ceases to be effective. These conditions may be of a physical nature, such as those which depend upon climate or the geographical features of the country, or they may arise out of the social, political, or economic circumstances of the people. In this way, numerous important and well-settled rules of the English common law (and the precedents establishing them) have been found inapplicable to the conditions prevailing in America, and therefore have been rejected by our courts and new rules created in their place. This has been the case with the common-law doctrine of riparian rights, when applied to the needs and customs of the people in the arid regions of the west, with the common-law rule as to the navigability of waters, when applied to our great freshwater rivers and lakes, with the strict English rules regarding waste, when applied to the clearing and cultivation of our new lands, and with the doctrine of markets overt. These and numerous other illustrations will be fully discussed and explained in a later chapter of this work.[840]

ABSENCE OF PRECEDENT; DECISION ON PRINCIPLE

50. If no precedent can be found to support the maintenance of a particular action, the award of particular relief, or the imposition of a particular liability or penalty, that fact is strong (but not conclusive) evidence that the law does not sanction it, and should be influential in deciding the courts to rule against it.

51. But this principle applies only where the case at bar is only new "in the instance," that is, where the particular application is novel, but the facts and circumstances of the case are such as may be pre-

[840] Infra, Chapter XI, p. 444.

sumed to have arisen often in the past, and might at any time have been brought before the courts if the particular contention had been deemed tenable.

52. But if the novelty of the case is due to the fact that the circumstances on which it is founded are the product of recent evolution in trade and commerce, in industrial or business organization, in sociology, economics, or science, or in the manners and customs of the people, the absence of any precedent, being thus accounted for, is no argument against its maintenance. On the contrary, in such cases, the law, as delivered by the courts, has an expansive property which enables it to frame new rules to meet new exigencies.

53. In passing upon a case of the latter kind, and in the absence of direct precedent, the courts will decide "upon principle." This means that they will base their decision upon legal analogies, upon the spirit and reason of the law, upon their views of the requirements of sound public policy and of general public convenience, and, ultimately, upon the principles of natural justice, as determined by the elements of honesty, fairness, and good sense.

Absence of Precedent; Cases New in the Instance

The absence of any precedent for a particular action or demand may be due to the fact that the point in question has never before been raised, having been considered too plain for argument, or the particular claim never before advanced, having been considered untenable. To this effect are the following remarks of an English judge: "It is admitted by every judge and by every counsel that has spoken upon the subject that there is a total silence of our law books, during the whole period of our ascertained law of England, upon this precise point, although circumstances similar to the present must have existed many times; and this to me is a strong convincing proof that, till these days of novelty, no such idea was ever entertained upon this question, and I verily believe that no man now living ever

before heard of such a claim being advanced." [341] Where this occurs, and where there is nothing novel in the facts and circumstances of the case, but they are such as may presumptively have arisen often in the past, and might have been brought before the courts for adjudication, the fact that no decision can be cited sustaining the action, awarding the relief asked, or recognizing the liability claimed, is strong evidence against its propriety or legality, not indeed absolutely conclusive, but to be very seriously considered by the courts.[342] Thus, it was remarked by the court in Ohio: "It is a fact entitled to some weight that among the multitude of adjudged cases relating to corporations, from the Year Books to the present day, not one can be found that decides the principle as it is contended for by the plaintiff. Although it forms no objection to an action that such an one has never before been brought, yet the fact affords strong presumptive evidence that the law is against it." [343] So in another state: "We are quite certain that no precedent exists sustaining the issuance of a fi. fa. on a judgment against a sovereign state in her own courts, though rendered with her own consent." [344] So the court in California, in holding that a parent is not liable in damages for the torts of his child, when committed without the parent's knowledge or sanction and not in the course of his employment of the child, said: "We have been cited to no case controlled by the principles of the common law that holds that the action under such circumstances can be maintained." [345] It was said by a federal judge: "I have been referred to no precedent, nor have I been able to find any, where a court of equity in such a case as the present

[341] Mirehouse v. Rennell, 8 Bing. 542, per Parke, J.

[342] Western Union Tel. Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; Webb v. Rome, W. & O. R. Co., 49 N. Y. 420, 10 Am. Rep. 389; Baltimore Belt R. Co. v. Baltzell, 75 Md. 94, 23 Atl. 74; Crispe v. Perritt, Willes, 471; Ashby v. White, 2 Ld. Raym. 944; Co. Litt. 81b.

[343] Orr v. Bank of United States, 1 Ohio, 36, 44, 13 Am. Dec. 588.

[344] Carter v. State, 42 La. Ann. 927, 8 South. 836, 21 Am. St. Rep. 404.

[345] Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101.

has granted the relief the plaintiff seeks. But in several analogous cases such redress has been denied and the aggrieved party turned over to his legal remedies." [346] So another judge remarked that arguments from inconvenience "are inducements which would be very powerful were I passing upon the question as a legislator. As a judge I am bound by precedent. No case can be cited in which a policy has been set aside during the life of the assured on the ground of a forfeiture occurring after the making of the contract." [347] Again, the Supreme Court of Pennsylvania, in holding that a real estate agent has no lien for his expenses on papers placed in his hands to enable him to effect a sale of the property, said: "Nor has the able counsel for defendants cited a precedent where such claim of lien was sustained. The claim appears novel." [348] In a case in New York an action was brought for damages to a dwelling house and its inmates by a private nuisance, and it appeared that the plaintiff lived in the house and supported the family, but the title and possession of the premises were in his wife. He recovered judgment below, which was reversed on appeal, the appellate court saying: "The case in its legal aspects is novel. * * * We find no precedent for such an action by a person so situated. * * * The principle upon which the judgment proceeds, if sustained, will greatly extend the class of actionable nuisances. * * * He cannot have an action, because it would lead to such a multiplicity of suits as to be itself an intolerable evil." [349]

But it does not follow that because an action is unprecedented it is unwarranted in law. The fact raises a strong presumption against it, it is true, but the presumption is not conclusive. If the case clearly falls within a recognized rule of law, the fact that it is one of first impression does not justify throwing it out of court. "It may be true," said

[346] Torpedo Co. v. Borough of Clarendon (C. C.) 19 Fed. 231.
[347] Connecticut Mutual Life Ins. Co. v. Bear (C. C.) 26 Fed. 582.
[348] Arthur v. Sylvester, 105 Pa. 233.
[349] Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689.

an English judge, "that a similar action in specie is not to be found in any law book; and I admit that if the case were new in principle, it would be necessary to apply to the legislature, and not to a court of law. But where the case is only one new in the instance, and the question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to a case which may arise two centuries hence as it was two centuries ago." [350] And an even stronger statement has been made in the following terms: "Unless it be shown by authority that an action does not lie, we must presume that it does, upon the common principle of justice that where the law gives a right, it also gives a remedy." [351]

Cases Novel as to Facts or Conditions

The novelty of a case, and the fact that no precedent can be found to fit it, may be due to the circumstance that the subject-matter is wholly new. The advance of civilization is marked by an increasing complexity of social and industrial organization, the evolution of new forms and methods of business, the spread of knowledge, the introduction of new inventions and discoveries, and their application to daily life. And thus new problems are constantly presented to the courts,—new because they involve rights, relations, or subjects not previously known in litigation. The law must keep pace with the evolution of society. The framing of new laws to cover new subjects is a legislative function. But in advance of legislation, and often concurrently with it, the courts are called upon to administer justice in cases resting upon entirely novel facts or conditions. Here, of course, the absence of a precedent is no argument against the right or liability asserted. On the contrary, it is the duty of the courts to deduce new principles from the analogies of the law or to frame new rules to meet the exigencies of the case. Thus they are constantly making additions to the common or unwritten law. The doctrine

[350] Deane v. Clayton, 7 Taunt. 515, per Park, J.
[351] Berkley v. Presgrave, 1 East, 229.

which ascribes this power and duty to the courts is not a modern invention. It is but a continuation of the process by which the very foundations of the common law were laid and which has been in action ever since. It is reported of Lord Ellesmere that he once said: "Every precedent must have a beginning. Why may we not make precedents as well as those who went before us?" And in another English case, in which counsel urged that there was no precedent to be found in the books sustaining the action in question, the Chief Justice (Anderson) replied: "What of that? Shall we not give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books, I will not regard them." [352] So again, it was said by Lord Mansfield: "It has been properly said that, as the times alter, new customs and new manners arise; these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule." [353] And the same doctrine has often been asserted by the courts in America. Thus, in Alabama, it is said: "The inquiry must not be unduly obstructed by the doctrine of stare decisis, for the life of the common-law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries and the requirements of an ever-advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom." [354] So by the court in Pennsylvania: "This has sometimes been called the expansive property of the common law. If the great mass of legal principles which has descended to us under the name of the common law is composed only of iron-clad rules, it would be wholly unsuited to the present age and generation, and the great changes which have taken place,

[352] Anonymous, Gouldsborough, 96.

[353] Corbett v. Poelnitz, 1 Durn. & E. 5. And see Allison v. McCune, 15 Ohio, 726, 45 Am. Dec. 605; Pasley v. Freeman, 3 Durn. & E. 63; Wilson v. McMath, 3 Barn. & Ald. 245n.

[354] Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

not only in the volume of business, but in the mode of conducting it. We are constantly applying the accepted principles of the common law to new phases and modes of doing business. This is a necessity, alike dictated by common sense and the necessities of trade." [355] So it has been said of the federal courts that "if a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision; but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name." [356] So, in reference to new phases of an old and familiar subject, Lord Redesdale is reported to have observed: "Cases cannot always be found to serve as direct authority for subsequent cases; but if a case arises, of fraud or presumption of fraud, to which even no principle already established can be applied, a new principle must be established to meet the fraud, as the principles on which former cases have been decided have been from time to time established as fraud contrived new devices; for the possibility will always exist that human ingenuity in contriving fraud will go beyond any cases which have before occurred." [357] And this principle has even been carried so far by the Supreme Court of Pennsylvania as to create a new criminal offense, without the aid of either statute or precedent, although of course the court only professed to recognize it as a part of the existing common law. It was said: "It may be conceded that there is no statute which meets this case, and if the crime charged is not an offense at common law, the judgment must be reversed. What is a common-law offense? We endeavored to answer this question in Commonwealth v. McHale, 97

[355] Commonwealth v. Hess, 148 Pa. 98, 23 Atl. 977, 17 L. R. A. 176, 33 Am. St. Rep. 810.

[356] Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868, 35 C. C. A. 62.

[357] Webb v. Rorke, 2 Sch. & Lef. 666.

Pa. 397 [39 Am. Rep. 808], in which we held that offenses against the purity and fairness of elections were crimes at common law and indictable as such. We there said: 'We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy.' Tested by this rule, we have no doubt that the solicitation to commit murder, accompanied by the offer of money for that purpose, is an offense at common law." [858]

Decision of New Case "On Principle"

When no direct precedent can be found to govern the decision of the case at bar, or when the decisions upon the same point in other jurisdictions are in irreconcilable conflict, it is a very common remark of the judges that they are thus left free, or that it is their duty, to decide the case "on principle" or "on general principles." [859] This statement, as observed by a learned and discerning writer, "is a sure indication of the impending establishment of an original precedent. It implies * * * that if there is no authority, and if therefore the question is one of pure fact, it is his [the judge's] duty, if possible, to decide it upon principle, that is to say, to formulate some general rule and to act upon it, thereby creating law for the future. It may be, however, that the question is one which does not admit of being answered either on authority or on principle, and in such a case a specific or individual answer is alone possible, no rule of law being either applied or created." [860] In view of the importance of this subject, it is necessary to obtain a definite idea of the meaning of the term "principle," as used by the courts in this connection. Theoretic-

[858] Commonwealth v. Randolph, 146 Pa. 83, 23 Atl. 388, 28 Am. St. Rep. 782.

[859] See, for example, Eaton v. Jaques, Dougl. 438; Jones v. Randall, Cowp. 37; Stockdale v. Onwhyn, 5 Barn. & C. 173; Webb v. Rorke, 2 Sch. & Lef. 666; Pitt v. Pitt, 1 Turn. & R. 184; Kennell v. Abbott, 4 Ves. 802; Quinn v. Chicago, B. & Q. R. Co., 63 Iowa, 510, 19 N. W. 336; McClintock v. South Penn. Oil Co., 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785.

[860] Salmond, Jurisprudence (2d Ed.) p. 174.

ally, of course, it is contrasted with "precedent" or "authority," and the implication is that the court, finding no precedent on which to base its ruling, will revert to those common-law principles which are supposed to furnish a guide or standard for the solution of all possible questions. In actual practice, however, an analysis of cases in which this method has been pursued shows that it consists in an endeavor by the court, lacking a direct precedent, to find some justification or support for its rulings in the analogies of the law, in its spirit and reason, in the opinions of jurists which possess persuasive value, in considerations of public policy or general convenience, and, finally, in the fundamental maxims of morality and justice. The process of deciding a case "on principle," therefore, consists in the steps enumerated in the following paragraphs, although of course it must be understood that they are not all invariably followed in any given case, or necessarily in the same sequence.

First, the court will search the repositories of the common or unwritten law for rules and principles which, although they may never have been applied to precisely the same combination of facts which are presently before it, are yet capable of being extended to cover the new combination by the process of analogy, the reason of the existing rule being discovered to be the same as that discernible in the case before the court.[361]

[361] Compare the following remarks of Parke, J., in Mirehouse v. Rennell, 8 Bing. 515: "The precise facts stated have not, so far as we can learn, been adjudicated upon in any court, nor is there to be found any opinion upon them of any of our judges or of those ancient text-writers to whom we look up as authorities. The case therefore is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all, and because it has not yet been decided, to decide it for ourselves according to our own judgment of what is just and expedient. Our common-law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which

Even if no very direct or striking analogies can be found, still a study of the books may disclose the fact that the courts have always pursued a certain policy, or maintained a certain attitude, towards transactions of the same general kind with that involved in the case at bar, or relations or claims such as those now before the court. This traditionary predisposition is taken as manifesting the "spirit of the law," and may properly form the basis of a decision in a novel case. In this light we are to understand the remark of the judge writing the opinion in an early case in Virginia, where it was said: "I have cited no cases in support of this opinion because, finding them, like the Swiss troops, fighting on both sides, I have laid them aside and gone upon what seems to me the true spirit of the law." [862] To a very great extent this spirit of the law has found expression in the ancient and familiar maxims; and instances are not wanting to show that recourse may be had in a novel case to the fundamental and well-recognized maxims of the common law and of equity and the decisions based thereon.[863]

Particularly in cases where the court has no previous decision of its own to serve as a precedent, and the decisions in other states, though numerous, are in conflict, an endeavor will be made to ascertain what is the preponderance of authority or the general trend of judicial opinion; and if it can be seen that there is a definite rule which is sup-

arise; and we are not at liberty to reject them and abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science. I propose, therefore, to inquire, by reference to those sources from which we usually derive them, what the rules and maxims of the common law upon this subject are, and it will be found that there is little difficulty in the inquiry, and none, as it seems to me, in their application to the facts under consideration."

[862] Watkins v. Crouch, 5 Leigh, 522, 530.

[863] See Firebrass v. Pennant, 2 Wils. 254; Demandray v. Metcalf, Prec. Ch. 419.

ported by the better and stronger authorities, or that the course of jurisprudence is plainly in progress towards a certain end, this will be taken as expressing the "principle" on which the instant case is to be decided. "In this state," says the court in New Jersy, "we have adopted no rule upon this subject broad enough to cover the present motion, but the drift of judicial opinion is in favor of the lien." [364] In determining the balance of authority, or the direction in which judicial opinion is moving, courts will often refer to text-books of recognized merit, and be influenced by the statements of their authors, as showing the conclusions reached by specialists in the particular subject. Sometimes, however, they will not be found in any better agreement than the decisions upon which they comment. How this may happen, and what must be done in such a case, is shown by the following extract from an opinion of the court in West Virginia: "Finding this contrariety of opinion in the courts of last resort, we naturally recur to the text-writers to ascertain how the scale ought to be adjusted and what held to be the better opinion. But instead of resolving our doubts, we find the conflict renewed with an energy almost acrimonious in its vigor. * * * Amidst this great contrariety of opinion, we must draw our conclusions in conformity with the spirit of our own decisions, and according to the dictates of a sound adherence to general principles." [365]

If neither precedent nor pertinent analogy can be found in the decisions of other states or of the federal courts, reference may be made to foreign systems of law. And if it shall be found that they have resolved the particular problem in a manner which commends itself to the court's sense of justice and of sound legal reason, they may form a proper basis for the decision to be made. Thus it was said in an important English case: "The Roman law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct au-

[364] Phillips v. Mackay, 54 N. J. Law, 319, 23 Atl. 941.

[365] Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17.

thority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe." [866]

The want of a precedent may sometimes be supplied by a settled conviction, in the mind of the court, as to the requirements of a sound and salutary public policy.[867] This is particularly the case where the rights or interests of the public are directly concerned, or where the effects of the decision to be made may extend far beyond the affairs of the parties immediately before the court, and lay the foundation for customs or practices which may have an important influence upon the general welfare or the moral development of the community in general.

In the absence of direct precedents, and where the court is at liberty to decide the case "on principle," the argument from inconvenience will be allowed much weight. Having in mind the effectuation of justice, and at the same time the establishment of a rule for the future which shall be fair and reasonable, workable, and likely to simplify the relations of parties and clarify their business transactions, the court will incline to that decision which is in accordance with general public convenience, rather than that which would introduce inconvenience or public mischief.[868]

But wanting all other standards of decision, the court must ultimately fall back upon the fundamental principles of justice, morality, and good sense. After all, the supreme function of a court is to deal out justice. And in the rare instances where a common-law judge finds himself absolutely unbound by precedent or tradition, he is clothed

[866] Acton v. Blundell, 12 Mees. & W. 324, 353.

[867] Yolo County v. Barney, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152; Gillis v. Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; Steib v. Whitehead, 111 Ill. 247.

[868] King v. St. Catharine's Hall, 4 Durn. & E. 243; Sadgrove v. Kirby, 6 Durn. & E. 486; Deane v. Clayton, 7 Taunt. 527; May v. Brown, 3 Barn. & C. 113, 131; Steel v. Houghton, 1 H. Bl. 61.

with the privilege and the duty of a chancellor, and his conscience must be his guide. Of course this does not mean the arbitrary or whimsical notions of the particular judge, but a rule of right educed from, or supported by, the common and universal conception of fair play and moral responsibility, of honest dealing and integrity, and of plain common sense. In the expressive language of Chief Justice Bleckley, "good sense, good morality, and good law are one and the same, so long as they are not sundered violently by legislation or ignorantly by judicial error." [869] The same matter has been stated somewhat more philosophically and not less convincingly by a recent text-writer, in the following terms: "Whence do the courts derive those new principles by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense. Judges are appointed to administer justice,—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature. When the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that any man may know them, and the light of nature is often but an uncertain guide. Instead of trusting to their own unguided instincts in formulating the rules of right and reason, the courts are therefore wisely in the habit of seeking guidance and assistance elsewhere. In establishing new principles, they willingly submit themselves to various persuasive influences which, though destitute of legal authority, have a good claim to respect and consideration." [870] Nor is it only in absolutely novel cases that the courts may thus recur to the principles of natural justice, but also in instances where the precedents have become conflicting and uncertain. "It is when the law has been rendered uncertain by the conflict of decisions that it becomes emphatically the duty of judges to recur to those first principles of justice

[869] Hull v. Myers, 90 Ga. 674, 16 S. E. 653.

[870] Salmond, Jurisprudence (2d Ed.) p. 175. And see Crispe v. Perritt, Willes, 473; Barker v. Lomax, Willes, 662.

which lie at the foundation of positive law, and by the application of which its existing uncertainty may, generally speaking, be effectually removed. The law (in the beautiful language of Lord Mansfield) 'works itself pure' by the fresh streams which it draws from its original fountains of equity and reason." [871]

[871] Suydam v. Jenkins, 3 Sandf. (N. Y.) 614, 626, per Duer, J.

CHAPTER II

DICTA

54. Nature of Dicta.
55. Argument and Consideration as Affecting Nature of Decision.
56. Decision Rested on Other Grounds.
57. Dicta Not Binding as Precedents.
58. Rulings in Anticipation of New Trial.

NATURE OF DICTA

54. A dictum is an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court. It may either be put forth as the personal opinion of the judge who delivers the judgment of the court, or introduced by way of illustration, argument, or analogy, but not bearing directly upon the question at issue, or it may be a statement of legal principles over and above what is necessary to the decision of the controverted questions in the case.

Dicta in General

In the common speech of lawyers, all such extra-judicial expressions of legal opinion as those above described are referred to as "dicta" or "obiter dicta," these two terms being used interchangeably.[1] In strict propriety of lan-

[1] See Florida C. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; In re Woodruff (D. C.) 96 Fed. 317; Hart v. Stribling, 25 Fla. 433, 6 South. 455; Buchner v. Chicago, M. & N. W. Ry. Co., 60 Wis. 264, 19 N. W. 56; Rush v. French, 1 Ariz. 99, 25 Pac. 816; State ex rel. Nourse v. Clarke, 3 Nev. 572. A dictum is an opinion expressed by the court, which, not being necessarily involved in the case, lacks the force of an adjudication. In order to make an opinion a decision, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties; and hence a court will not be bound by any part of an opinion (of its own or of a court which it was bound to follow) which was not needful to the ascertainment of the question between the parties. In re Woodruff, supra.

guage, however, there are several kinds of dicta, not differing in their lack of authoritative force, but differing in their nature or in respect to the manner of their introduction into judicial opinions.

Obiter Dicta

An "obiter dictum" is a remark made or opinion expressed by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion.[2] "Dicta are opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself; obiter dicta are opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects." [3] For example, if a case involves a question as to the law relating to married women, and the judge who delivers the opinion, arguing in support of the conclusion reached by the court, draws an analogy from the law of the contracts of infants, his statement on that point is obiter dictum, and the opinion cannot be regarded as an authority upon the point referred to. As remarked by the court in Florida, quoting from an old book, "an obiter dictum, in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it." [4]

Dicta Propria

Dicta of another class are found in the books which, though they have not hitherto borne a special name, might

[2] Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805. And see Lucas v. Board of Com'rs of Tippecanoe County, 44 Ind. 524. It is to be observed that some of the courts use the term "judicial dicta" to designate dicta made by a court or judge in the course of a judicial decision or opinion. See Commonwealth v. Paine, 207 Pa. 45, 56 Atl. 317.

[3] Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 58, 20 Am. Rep. 451.

[4] Hart v. Stribling, 25 Fla. 435, 6 South. 455.

properly be called "dicta propria," that is, personal or individual dicta, the private views of the judge who delivers the opinion, not necessarily concurred in by the whole court, and not essential to the disposition of the case at bar. Dicta of this kind most commonly occur in the case of an opinion written by a judge who, though he concurs in the general decision as to the rules of law which must govern the case, is not willing to accede to all the reasoning which has led the court to the conclusion reached. But there are also numerous examples of such dicta delivered by a judge who speaks for the court on the general lines of the decision, but incidentally steps outside the record to express his individual views as to some point or question.

Gratis Dicta

A third kind of dicta are those which embody statements of legal principle more broad or general than is necessary for the determination of the case before the court, or, after the specific questions involved have been decided, add superfluous expressions of opinion on points or questions not in the record, or lay down rules for similar or analogous cases. These are properly called "gratis dicta," because they make judicial assertions of law over and above what is needed for the particular case.[5] It must be remembered that the question presented to an appellate court is always specific—whether a new trial should be granted or refused, whether the judgment of the court below should be affirmed or reversed, whether or not the writ of mandamus should issue, etc. This question is the one to which the decision and opinion of the court should be directed, and,

[5] "An extra-judicial opinion given in or out of court is no more than the prolatum or saying of him who gives it, nor can it be taken for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. An opinion given in court, if not necessary to the judgment given of record, but that might have been as well given if no such or a contrary opinion had been broached, is not a judicial opinion, nor more than a gratis dictum." Bole v. Horton, Vaughn, 360, 382. And see Hart v. Stribling, 25 Fla. 433, 6 South. 455; Municipal Court of Providence v. Bostwick, 31 R. I. 550, 78 Atl. 53; Scottish Union & National Ins. Co. v. Wade (Tex. Civ. App.) 127 S. W. 1186.

ordinarily, when this question has been decided, anything that follows is merely gratis dictum, because unnecessary to the decision of the case. A perfect example of a gratis dictum is found in the important case of Pennoyer v. Neff,[6] in the Supreme Court of the United States. In this case, the question was as to the validity and effect of a judgment rendered in a state court against a non-resident of the state, upon a constructive service of process and the attachment of certain property of his within the jurisdiction. It was held that such a judgment, being otherwise regular, would bind the property attached, but not the person of the defendant nor any other property belonging to him, though found within the state. When this conclusion was reached, the case before the court was disposed of. But Mr. Justice Field, who wrote the opinion, added: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." This, it will be seen, was purely gratis dictum; and it is none the less so because the statement thus made has been universally accepted as a valuable contribution to the case-law on the subject of the validity of decrees of divorce, and has come to be relied on as having practically the effect of a direct decision. Another form of gratis dictum lurks under the word "semble," so frequently found in the reports. This term is often used to preface a statement by the court upon a point of law which is not directly

[6] 95 U. S. 714, 24 L. Ed. 565.

decided, when such statement is intended as an intimation of what the decision would be if the point were necessary to be passed upon. It is also used to introduce a suggestion by the reporter, or his understanding of the point decided when it is not free from obscurity.

Miscellaneous Examples

In a case in the federal courts, the question at issue was as to the right of the complainant railroad company to the use of a bridge owned by the defendant railroad company, under a contract between the parties, which right was denied by the defendant on the ground that the contract was ultra vires on its part. The supreme court, on appeal, decided that the contract was valid, first because it was one which the defendant had power to make at common law, and second because it was expressly authorized by an act of Congress. This being sufficient to dispose of the appeal, a further statement in the opinion that the act made it the duty of the defendant to permit the complainant to run its trains over the bridge was dictum only, not being necessary to the determination of any issue before the court.[7] Again, the fact that an appellate court, in the course of its argument, has stated in several cases that the writ of mandamus should not issue where there is a serious question in regard to the title to an office, that being the matter in dispute, is not equivalent to a decision that, where there is no serious question in regard thereto, mandamus will lie.[8] So where, in a garnishment proceeding, the court had no jurisdiction of the res, any errors in the proceedings leading up to the discharge of the garnishee would be immaterial, and therefore any discussion of such errors by the court above, or any consideration of the service upon the garnishee, would be merely dictum.[9] But on the other hand, where the question before an appellate court was whether a provision in a statute applicable only to a particular county, and

[7] Mason City & Ft. D. R. Co. v. Union Pac. R. Co. (C. C.) 124 Fed. 409.

[8] People ex rel. McLaughlin v. Board of Police Com'rs of City of Yonkers, 174 N. Y. 450, 67 N. E. 78, 95 Am. St. Rep. 596.

[9] Bristol v. Brent, 36 Utah, 108, 103 Pac. 1076.

relating to the taxation of the stock of corporations of that county, had been repealed by a general statute relating to the valuation and assessment of property in the state, a construction of the former statute, entered upon by the court for the purpose of ascertaining whether there was any conflict between the acts such as to work a repeal, was necessary to the determination of the precise question before it, and therefore not obiter dictum.[10] So where a petition drawn under a statute is involved on an appeal, in which an interpretation of the statute becomes necessary, an explanation of what is necessary to bring the petition within the statute as thus expounded, and a statement of the reason why the petition is held defective, are germane to the decision of the point involved and not dicta.[11] So the statement of the court on an appeal, where the controversy is whether a party instituting condemnation proceedings can dismiss before the filing of the award, that, under the statute, it cannot dismiss after such filing, is not a mere dictum, although an answer to that question was not expressly required by the decision.[12]

ARGUMENT AND CONSIDERATION AS AFFECTING NATURE OF DECISION

55. The true distinction between a decision and a dictum does not depend upon the question whether the point was argued by counsel and deliberately considered by the court, but upon the question whether the solution of the particular point was necessary to the determination of the issues involved in the case and essential to the disposition which the court made of it.

[10] City of Baltimore v. Allegany County Com'rs, 99 Md. 1, 57 Atl. 632.

[11] Commonwealth v. Louisville Property Co., 139 Ky. 689, 132 S. W. 413.

[12] Sprague v. Northern Pac. Ry. Co., 122 Wis. 509, 100 N. W. 842, 106 Am. St. Rep. 997.

The reason often assigned for not conceding to dicta the weight and effect of precedents is that they are expressions of opinion upon some matter which may not have been argued at the bar or duly brought to the attention of the court, or that they do not embody the mature and deliberate opinion of the judges, while, on the other hand, some of the cases attribute the full value of judicial precedents to points fully argued and deliberately decided, though not necessary to the determination of the case.[13] "Dicta are opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself." [14] "It frequently happens that in assigning its opinion upon a question before it, the court discusses collateral questions, and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection and without previous argument at the bar." [15] "In Maryland, it is usual to limit the judgment to the questions of right involved in the issue. But where a question of general interest is supposed to be involved, and is fully discussed and submitted by counsel, the court frequently decides the question with a view to settle the law; and it has never been supposed that a decision made under such circumstances could be deprived of its authority by showing that it was not called for by the record." [16] And the court in Vermont declares that, if an expression of opinion on a point argued by counsel and deliberately passed on by the court is a dictum, it is "a judicial dictum, as distinguished from a mere obiter dictum, that is, an expression originat-

[13] See Florida Cent. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; State ex rel. Nourse v. Clarke, 3 Nev. 566; Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 Pac. 631; Kiernan v. City of Portland (Or.) 112 Pac. 402.

[14] Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451.

[15] Rush v. French, 1 Ariz. 99, 25 Pac. 816.

[16] Alexander v. Worthington, 5 Md. 471.

ing alone with the judge who writes the opinion, as an argument or illustration." [17]

But this is not the true ground of distinction. The test is whether the statement made was necessary or unnecessary to the determination of the issues raised by the record and considered by the court.[18] And although a point may not have been fully argued, yet the decision of the court thereon cannot be considered a dictum, when the question was directly involved in the issues of law raised by the record, and the mind of the court was directly drawn to, and expressed upon, the subject.[19] But, per contra, if the statement in the opinion was merely an illustration or argument, or a private view of the judge speaking, or was superfluous and not needed for the full determination of the case, it is not entitled to be accounted a precedent, for the reason that it was, so to speak, rendered without jurisdiction or at least extra-judicial. Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings. Over and above what is needed for the solution of these questions, its deliverances are unofficial. Now a statement of law makes a precedent, not because it emanates from a wise and learned man, but because it is laid down by a judge, in his office of judge, and speaking to a question brought before him as a judge. In other words, in rendering a decision upon a point actually involved and necessary to the determination of the case, the court acts in a judicial capacity, performs a judicial function, and is clothed with official authority, and therefore formally and authoritatively pronounces the law. Its decision becomes from that moment a part of "the law of the land," or at least it becomes official and authoritative evidence of what is the law of the land. But this power of

[17] Derosia v. Ferland, 83 Vt. 372, 76 Atl. 153, 28 L. R. A. (N. S.) 577, 138 Am. St. Rep. 1092.

[18] Cross v. Burke, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896; Shires v. Allen, 47 Colo. 440, 107 Pac. 1072.

[19] Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106.

the courts to make law is limited, from the very nature of the case, to instances where they are acting within their jurisdiction and exercising, officially, their judicial functions. Hence it follows that dicta of all kinds, however maturely they may have been considered, or however correctly they may state the law, are not technically entitled to the weight of precedents, because not within the limits of official decision nor made in the exercise of judicial functions. In effect, the difference between a dictum and a judicial precedent is the difference between an unofficial assertion of a principle of law and a decision of a controverted question. To this effect speaks the Supreme Court of the United States in the following language: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, as other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." [20]

DECISION RESTED ON OTHER GROUNDS

56. A court's expression of opinion upon a point actually involved in the issues and properly before it for determination is not reduced to the level of mere dictum by the fact that the actual judgment in the case is ultimately rested upon some other ground or grounds.

It is not the practice of courts to rest their decisions upon a single ground when there are several in the case,

[20] Carroll v. Carroll's Lessee, 16 How. 275, 14 L. Ed. 936.

nor upon the narrowest possible basis of fact. Neither is it necessary for the court to stop short when it has defined, in the narrowest possible terms, a precise point sufficient to dispose of the case. On the contrary, every consideration which is directly controlling of the actual issue tendered is a legitimate ratio decidendi, and any matter of fact or of law thus presented which would defeat the claim of the plaintiff is germane to the issue and the court's opinion thereon is not obiter dictum, although the opinion also disposes of other questions in a manner which would be determinative of the case.[21] As somewhat differently stated, where a question was presented and discussed in a case, and the opinion of the court expressed on it, which question was presented by the instructions or rulings below, the opinion is not obiter dictum, although the decision of that question might have been omitted. It frequently happens that the decision of a single point in a case will determine the affirmance or reversal of the judgment in that case, but it does not follow that the court may not proceed to examine and decide other points which the record presents; and indeed the latter course is more satisfactory to all parties concerned, and saves the necessity of again resorting to the inferior court.[22] Hence it cannot be said that a case is not authority on a given point because, although that point was properly presented and decided in the regular course of the consideration of the case, something else was ultimately found which disposed of the whole matter.[23] Thus, where, in an action against a rail-

[21] Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa, 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117.

[22] Kane v. McCown, 55 Mo. 181.

[23] Florida Cent. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; Buchner v. Chicago, M. & N. W. R. Co., 60 Wis. 264, 19 N. W. 56; Clark v. Thomas, 4 Heisk. (Tenn.) 419; Starr v. Stark, 2 Sawy. 603, Fed. Cas. No. 13,317; San Joaquin & K. R. Canal & Irrigation Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. 365; People v. Read, 233 Ill. 351, 84 N. E. 214; New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103; Lancaster County v. McDonald, 73 Neb. 453, 103 N. W. 78; Carstairs v. Cochran, 95 Md. 488, 52 Atl. 601. But see Mulford v. Estudillo, 32 Cal.

follow the establishment of new precedents. For example, criticism of a former decision, however direct and forcible, does not amount to overruling it and does not in any way impair its authority, when made in a case where such criticism was unnecessary to the decision of the matter before the court, or in other words, where it was merely obiter dictum.[27] So a verbal expression of opinion by one of the judges of the supreme court after the judgment has been pronounced does not become a part of, or cannot affect, the law of the case.[28] Neither is it safe for lawyers or laymen to rely on a dictum as expounding or changing the law. In a case in Mississippi it was declared, in the language of the official syllabus, that "no one has a vested interest in an erroneous dictum of the appellate court respecting the crime which he commits while such dictum is not overruled," or, in other words, the doctrine of stare decisis cannot be extended so far as to allow a person guilty of a penal or criminal offense to shield himself behind a judicial statement of the nature or constituents of the offense, which would have justified his action, when such statement was merely obiter dictum and is afterwards pronounced erroneous.[29] But as the public have a right to rely on the judgments of the court of last resort as correct expositions of the law, and as it often requires nice discrimination and close analysis, even on the part of a skilled lawyer, to separate the dicta from the decision in an important case, it is evidently the duty of the high courts to confine their opinions very closely to the matter in hand and necessary to be decided. In fact, judges have frequently expressed their dislike of making obiter remarks in their own opinions, and condemned the practice of incorporating dicta in the decisions of other courts. The reason is that such unnecessary statements lead the people and the profession to speculate upon the probability of obtaining a decision in accordance with the view intimated in

[27] Koerner v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292.

[28] Steele v. Charlotte, C. & A. R. Co., 14 S. C. 324.

[29] Lanier v. State, 57 Miss. 102.

the dictum, and hence, as has sometimes been said, "obiter dicta invite litigation."

The duty of inferior courts with respect to dicta in the opinions of the court above is sometimes a question of much delicacy. On the one hand, it is evident that a remark of the court of last resort which is clearly and purely obiter dictum is not binding on the court below in other similar cases. It should be treated with respectful consideration, not only because it proceeds from the appellate court, but also as furnishing a suggestion of the decision which that court might be expected to make if the point should come fairly before it for determination. Yet dicta are certainly not entitled to the same absolute and imperative force as the rulings on points actually decided.[30] On the other hand, it is a serious error and a dangerous practice for the inferior courts to minimize the decisions of the appellate court, or to "distinguish" them out of the way of their own views, by treating them as mere dicta on a subtle analysis of the points involved and classification of them as necessary or unnecessary to the decision in the case.[31]

But dicta, though not precedents, may possess considerable value as persuasive arguments. This occurs chiefly where there are no direct adjudications upon the precise point, or where the decisions are in direct conflict. Thus it was said in an English case: "It is a remarkable fact that there is no direct decision to be found upon the point, but although there is not a decision, there are dicta bearing on the question. * * * Although these statements were *not* necessary for the decision of the particular cases, still *they* are of the highest importance and value, and in my opinion they declare the common law." [32] It should also be remarked that a dictum, though not originally entitled to rank as a precedent, may eventually come to occupy a position hardly distinguishable from that of a direct adjudication. This happens when the dictum is regarded as embodying a particularly correct or forcible statement of

[30] Toher v. Crounse, 57 Misc. Rep. 252, 107 N. Y. Supp. 990.
[31] See remarks in Gibson v. Chouteau, 7 Mo. App. 1.
[32] Munster v. Lamb, 49 Law T. (N. S.) 252.

legal doctrine, and is frequently referred to with approval.[33] Again, a dictum is sometimes made the starting point for a line of direct decisions, which, notwithstanding the origin on which they rest, are too weighty, in their accumulated strength, to be overthrown.[34]

RULINGS IN ANTICIPATION OF NEW TRIAL

58. When an appellate court reverses the judgment of the court below and remands the case for further proceedings, and in its opinion states the rules and principles of law which are to be applied to the questions likely to arise upon the new trial, these statements are not to be regarded as dicta, although they are additional to the determination of the precise point which caused the reversal of the judgment.

After an appellate court has decided that a judgment should be reversed and a new trial granted, it will often proceed to pass upon the various questions of law raised by the record, in order that the court below may be correctly guided in the further proceedings in the case. Although perhaps it was unnecessary to do more than point out some one radical error which would require the reversal of the judgment, yet such additional rulings on points of law are not, in the case we have supposed, to be regarded as dicta, for the reason that such points are within the case and are decided upon argument and the full consideration of the judges.[35] But where the opinion of a court declares

[33] The Hercules (C. C.) 20 Fed. 205.

[34] Lewis v. Thornton, 6 Munf. (Va.) 87; Mosher v. Huwaldt, 86 Neb. 686, 126 N. W. 143.

[35] For instance, "as the case must be reversed, we think it not improper to express our views as to those questions which may arise in another trial." Williams v. McFadden, 23 Fla. 143, 1 South. 618, 11 Am. St. Rep. 345. "As the cause will be remanded for a new trial, we feel bound to consider a further question which had received careful attention in the arguments filed." Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433. "But the question

that the conclusions already reached and set forth are sufficient to dispose of the case at bar, but that another question presented by the record, though unnecessary to the determination of the case, is one of general importance and likely to arise frequently in the future, and therefore "it may as well be decided now as hereafter," its decision of that question is dictum and not a binding precedent.[86]

will perhaps arise hereafter, and may as well be met, whether the agreement was in fact a discontinuance." Callanan v. Port Huron & N. W. R. Co., 61 Mich. 15, 27 N. W. 718.

[86] In re Woodruff (D. C.) 96 Fed. 317.

CHAPTER III

DOCTRINE OF STARE DECISIS

59. General Principle.
60. Change in Composition or Organization of Court.
61. Stare Decisis Distinguished from Res Judicata.
62. Decisions on Matters of Practice.
63. Former Decision on Same Facts or Transaction.
64. Decisions on Questions of Fact or Evidence.
65. Limitations of Rule; Decision Manifestly Erroneous.
66–68. Reasons For and Against Overruling Former Decision.
69. Extremes to be Avoided.
70. Conflicting Decisions.

GENERAL PRINCIPLE

59. The doctrine of adherence to judicial precedents is expressed in the maxim "stare decisis et non quieta movere."

Meaning of the Rule

The maxim quoted above embodies a rule or principle of action for the courts to follow. More fully expressed, it means that when a point or principle of law has been once officially decided or settled, by the ruling of a competent court in a case in which it was directly and necessarily involved, and more especially when it has been repeatedly decided in the same way, it will no longer be considered as open to examination, or to a new ruling, by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases; ordinarily the rule so established will be adopted in all subsequent cases to which it is applicable, without any reconsideration of its correctness in point of law.[1] As

[1] Wright v. Sill, 2 Black, 544, 17 L. Ed. 333; Martin's Ex'x v. Martin, 25 Ala. 201; Boynton v. Chicago Mill & Lumber Co., 84 Ark. 203, 105 S. W. 77; Washington, A. & Mt. V. Ry. Co. v. Chapman, 26 App. D. C. 472; Fidelity & Deposit Co. of Maryland v. Nisbet, 119 Ga. 316, 46 S. E. 444; Gray v. Gray, 34 Ga. 499; Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 36 L. R. A. 193; South's Heirs

stated by the court in New York, "stare decisis" is the name given to the doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same.[2] This rule is of surpassing importance. Adherence to judicial precedents is a cardinal principle in jurisprudence;[3] and it is upon this basis that the whole elaborate structure of our case-law has been built up.

It will be perceived that the rule or maxim contains no implication as to the correctness or fallacy of the precedent required to be followed. It is not, in its own terms, limited to cases where the former decision is now considered to have been rightly and satisfactorily made. In its widest extent, it means that the courts must abide by the precedents whether right or wrong. Of course this is an extreme statement, and it would be impossible, in practice, to apply the rule with any such severity without producing the most disastrous consequences. But the importance of the maxim and its actual working are best seen in instances where the courts declare themselves bound to abide by the former decisions although they entertain serious doubts as to whether they are legally defensible, or although (as they often say) they would decide the question differently if it were a new case, or although they are thoroughly con-

v. Thomas' Heirs, 7 T. B. Mon. (Ky.) 59; Thomas v. Blair, 111 La. 678, 35 South. 811; People v. Droste, 160 Mich. 66, 125 N. W. 87; Cape Girardeau & T. B. T. R. Co. v. Southern Illinois & Missouri Bridge Co., 215 Mo. 286, 114 S. W. 1084; Long v. Long, 79 Mo. 644; Shoenberg v. Heyer, 91 Mo. App. 389; Hoosier Mfg. Co. v. Swenson, 87 Neb. 182, 127 N. W. 114; Mosher v. Huwaldt, 86 Neb. 686, 126 N. W. 143; Horton v. Hayden, 74 Neb. 339, 104 N. W. 757; Bowman v. Board of Chosen Freeholders of Essex County, 73 N. J. Law, 543, 64 Atl. 1010; Gibbons v. Ogden, 17 Johns. (N. Y.) 488; State v. Clark, 9 Or. 466; Cox v. Crumley, 5 Lea (Tenn.) 529; Sydnor v. Gascoigne, 11 Tex. 449; State ex rel. Atkinson v. Ross, 43 Wash. 290, 86 Pac. 575. Compare Strauss v. Merchants' Loan & Trust Co., 119 Ill. App. 588.

[2] Moore v. City of Albany, 98 N. Y. 396.

[3] Coulter v. Phœnix Brick & Const. Co., 131 Mo. App. 230, 110 S. W. 655.

this statute could not be accorded any retrospective operation, and that if it was intended to have that effect, it was so far unconstitutional.[15] Yet it appears to be now the rule in that state that a decision concurred in by the entire bench of six justices cannot be reversed except upon a like concurrence.[16] And it is worth noting that the House of Lords, the court of last resort in the British Empire, has more than once stated its conviction that a judicial decision of the House upon a question of law is binding and conclusive in subsequent cases, not only upon all inferior courts, but upon the House itself, so that an erroneous decision cannot be overruled, but can only be set right by an act of Parliament.[17] But, conceding the power of a court to overrule its previous decision, it should only be done upon a proper occasion and in a proper manner. This is illustrated by a declaration of the Supreme Court of Colorado that its decisions, deliberately announced in litigated cases, ought not to be overruled on ex parte arguments in response to legislative inquiries.[18] This statement was made upon the occasion of an attempt to obtain an opinion of the Supreme Court favorable to the constitutionality of a proposed act of the legislature, the question being propounded to it by the House of Representatives. At the hearing, arguments were presented in support of the constitutional validity of the proposed statute, but no one appeared in opposition. The court had several times before decided that what the pending bill proposed to do could not constitutionally be done.

Circumscribing Former Decision

When a court entertains serious doubts of the correctness of a former decision, or finds it opposed to the weight of authority, or regards it as unfortunate in its conse-

[15] Bond v. Munro, 28 Ga. 597.

[16] Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 S. E. 452.

[17] London Street Tramways Co. v. London County Council [1898] App. Cas. 375; Beamish v. Beamish, 9 H. L. Cas. 274, 338; Attorney General v. Dean of Windsor, 8 H. L. Cas. 391.

[18] In re House Resolutions Concerning Street Improvements, 15 Colo. 598, 26 Pac. 323.

quences, and yet holds that it must be adhered to, on the principle of stare decisis, the common practice is to erect a wall around it and confine it strictly within bounds. In other words, the court will confine the doctrine of that case to the very narrowest limits, will refuse to apply it to any subsequent case that does not present exactly the same facts, and will be careful not to extend it by analogy.[19] Yet this process of limiting and distinguishing a former case is a very insidious one, and often results in the entire destruction of a precedent which the court has never distinctly overruled. Against this practice a note of warning has been sounded by the Supreme Court of Pennsylvania, in the following words: "It is better to let the rule stand as it was left by our predecessors than to pare it away by supersubtle distinctions while professing to accept it as settled." [20]

CHANGE IN COMPOSITION OR ORGANIZATION OF COURT

60. A change in the organization of a court, or in the personnel of the judges, will not throw its former decisions open to reconsideration, nor justify their reversal, except on grounds which would have warranted such a course if the court had remained the same.

Although the membership of a court may change from time to time, by the appointment or election of new judges in place of those who leave the bench, yet it remains the same court. When a former decision comes in question as a precedent, it may be that not one of the judges who concurred in it may remain as a member of the court. Yet it is none the less binding and conclusive, on the principle of

[19] Judson v. Gray, 11 N. Y. 408; Tinder v. Tinder, 131 Ind. 881, 30 N. E. 1077.

[20] In re Gray's Estate, 147 Pa. 67, 23 Atl. 205.

stare decisis. For, when considered as a precedent, it is not an expression of the individual views of the judges for the time being, which their successors may or may not share, but its authority is derived from the fact that it is the judgment of the court, which has not changed, though its members have.[21] Indeed it is said to be specially important that the principle of stare decisis should not be forgotten in courts where the judges hold their places for short terms and may all be changed at once.[22] It was said by the old Supreme Court of New York: "Especially in this court, where nearly one-fourth of its members are annually changed, and by popular election, the maxim that it is best to adhere to our decisions, and not to disturb questions which have once been put at rest here, should be permitted to have its full effect." [23] For a similar reason, some supreme courts refuse to consider the overruling of a former decision unless the point is argued before the full bench. Thus, the court in Georgia, speaking of certain of its former rulings, said: "Whether these decisions be right or wrong, this court, as now constituted, one of our associates being absent from providential cause, cannot review them, and we are bound to follow them in this case." [24]

The same principle applies where a court is reorganized under a new constitution or statute, or an existing court abolished and a new one erected in its place. If the new court is invested with the same jurisdiction as the old one, and simply succeeds to its duties and functions, so as to be practically a continuation of it, the decisions of the old court are binding on the new court in exactly the same way and to the same extent as its own decisions. A question arising in the new court is not to be considered as res nova, if covered by a decision of the old court; and the rulings of the latter are not to be reversed except for the same causes which would justify the new court in over-

[21] See Olcott v. Tioga R. Co., 26 Barb. (N. Y.) 147.
[22] Grubbs v. State, 24 Ind. 295.
[23] Driggs v. Rockwell, 11 Wend. (N. Y.) 507.
[24] Adams v. Franklin, 82 Ga. 168, 8 S. E. 44.

ruling a decision of its own.[25] And substantially the same rule should be applied when a territory is admitted as a state of the Union. In this case, the decisions of the territorial supreme court will not be disturbed by the state supreme court, unless it is able to pronounce them plainly erroneous.[26]

STARE DECISIS DISTINGUISHED FROM RES JUDICATA

61. A judgment is binding and conclusive, as res judicata, only upon the parties to the particular suit and those in privity with them, and it raises an estoppel as to disputed matters of fact. But a judicial precedent is applied, on the principle of stare decisis, to a similar state of facts subsequently arising, though the parties may be different, and it is conclusive of questions of law, not of fact.

"A judgment, as to all matters decided thereby, and as to all matters necessarily involved in the litigation leading thereto, binds and estops all parties thereto and their privies in all cases where the same matters are again brought in question. Such is the doctrine of res judicata. There is also the doctrine of stare decisis, which is of a different nature. When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, and this it does

[25] Spicer v. Norton, 13 Barb. (N. Y.) 542; Davis v. Superior Court of City and County of San Francisco, 63 Cal. 581; Hammond v. Ridgely's Lessee, 5 Har. & J. (Md.) 245, 9 Am. Dec. 522; Parker v. Pomeroy, 2 Wis. 112. Compare Lewis v. Wilson, 1 McCord, Eq. (S. C.) 210. The Court of Appeals of the District of Columbia does not consider itself bound by a decision of the former Circuit Court of the District, if convinced of its unsoundness in principle, and if it did not establish a rule of property. Brown v. United States, 35 App. D. C. 548.

[26] Doolittle v. Shelton, 1 G. Greene (Iowa) 272.

for the stability and certainty of the law." [27] In effect the two principles differ in three main particulars. First, as to the parties affected. A judgment (unless it be in rem) is conclusive only upon the parties to the former litigation and those who are in privity with them. But a judicial precedent will be applied by the courts without any regard to the parties, it being only necessary that their legal rights and relations should be substantially the same as those passed upon in the former case. Hence a former decision may furnish an imperative rule for the decision of a later case, although it would not be technically pleadable as an estoppel, because the same parties, or some of them, are not before the court in the later case. [28] To this effect speaks the Court of Appeals of Maryland: "We may concede, for the sake of argument, that, technically and strictly speaking, this suit is not res judicata, because the parties are different, and the present parties should not be held conclusively bound by the decision in that case, in which they had no opportunity to be heard. We may also concede that the judgment in that case is not what may properly be termed a judgment in rem and binding on the world. We may also further concede the power of the court to reverse its own decision. But notwithstanding all this, we think that both sound reason and the authority of adjudged cases will amply justify us in a refusal to reopen this question of title." [29]

Secondly, the two principles differ as to the nature of the questions settled. The doctrine of estoppel by judgment applies to controverted questions of fact, and prevents the re-examination of issues of fact once judicially settled in a court of competent jurisdiction. The rule of stare decisis has no relation to matters of fact, but is applicable when disputed questions of law have been officially settled and

[27] Moore v. City of Albany, 98 N. Y. 396, 410.

[28] Vall v. Territory of Arizona, 207 U. S. 201, 28 Sup. Ct. 107, 52 L. Ed. 169; Reynolds v. Davis, 5 Sandf. (N. Y.) 267; Richardson Drug Co. v. Raymond, 59 Neb. 157, 80 N. W. 490; Birdseye v. Rogers (Tex. Civ. App.) 52 S. W. 985; Whittemore v. Cope, 11 Utah, 344, 40 Pac. 256.

[29] Kolb v. Swann, 68 Md. 516, 13 Atl. 379.

determined. It does not require, like the principle of res judicata, that the facts involved in the later case should be identically the same facts as were involved in the former case, or the very same transaction. They may be a wholly different set of facts. But if their legal aspects and consequences are the same, the former decision will furnish the rule of law to be applied in the later case. For example, a judgment in a suit involving the taxes of a previous year cannot be used as an estoppel in a controversy over the taxes of a subsequent year, because the cause of action is not the same. But the rule of stare decisis will apply to a decision made upon any particular question of law raised in the earlier tax-suit and again arising in the later case.[30] So a decision of the supreme court, rendered on appeal from a conviction for the violation of a municipal ordinance, sustaining the validity of the ordinance, must be taken as settling that question on a second prosecution of the same defendant for another violation.[31] Again, although a judgment rendered in a subsequent action, during the pendency, but after the trial, of a prior action involving the same issues, is not res judicata of the matters involved in the first cause, yet the determination of the subsequent cause will be held decisive of the prior action, unless manifestly erroneous.[32] And for another illustration, a former judgment between the same parties, touching the same cause of action, though not pleaded in bar nor offered in evidence in the court below (and therefore not properly raised as an estoppel in the case), will be taken by the appellate court as conclusive of the matter in controversy, upon the principle of stare decisis.[33]

In the third place, while both these rules are directed to the same general end, namely, to put an end to litigation, they differ in the modes by which they seek to accomplish

[30] Buchanan v. Knoxville & O. R. Co., 71 Fed. 324, 18 C. C. A. 122.

[31] People v. Gardner, 143 Mich. 104, 106 N. W. 541.

[32] McGill v. Holmes, Booth & Haydens, 54 App. Div. 630, 66 N. Y. Supp. 359.

[33] Knox v. Randall, 24 Minn. 479.

this purpose. A judgment is held to be conclusive in order that the parties may not be at liberty to renew the same litigation at their pleasure. The object is to put a definite end to each individual controversy when a final judgment has been reached, so that it may not be indefinitely protracted in the courts. The doctrine of stare decisis, on the other hand, seeks to prevent litigation in general by rendering it unnecessary. Its object is to impart such certainty and stability to the law that every man may be certified of the nature and extent of his various rights and legal relations, and may be enabled to govern his conduct in such a manner as to make it unnecessary for him to come before the courts either as a plaintiff or a defendant.

DECISIONS ON MATTERS OF PRACTICE

62. The rule of stare decisis is specially applicable to decisions on matters of procedure or practice, which will not ordinarily be overruled, if generally recognized and long established, although deemed erroneous.

It is especially important for the proper and expeditious conduct of judicial business that the rules of practice and procedure should be stable. If these were subject to constant fluctuation, with the changing views of the judges, the greatest hardship and inconvenience would result. On the other hand, if these rules are well-known and uniform, it is ordinarily easy to conform to them, and they could hardly be productive of any serious injury to individuals or their rights, even though founded on a mistaken conception of the law or an erroneous construction of a statute. Hence it is an almost invariable rule to adhere to former decisions settling the rules of procedure, when they are generally known and acted on, and when they have been established for such a length of time as to make a change injudicious, even though it may have become apparent that they were wrongly decided, or although the

court would have reached a different conclusion if the case were before it for the first time.[84] As the case is put by the court in Kansas, a mere matter of practice, once settled by the decision of the court of last resort and unchallenged for years, ought not to be disturbed except in case of "glaring and dangerous error." [85] On this principle, where a statute provides that a judge may settle and sign a bill of exceptions after the expiration of his term of office, and the power thus conferred has been continuously exercised and recognized by the courts, it will not be considered open to question, but the principle of stare decisis will be applied, although the question as to the constitutionality of the statute may never have been decided.[86]

FORMER DECISION ON SAME FACTS OR TRANSACTION

63. Questions of law once fully considered and decided by an appellate court will not be re-examined in a subsequent controversy, where the cause of action or defense grows out of the same identical instrument, transaction, or occurrence, although the second action is entirely independent of the first and the parties are not the same.

It should be observed that this rule is not an application of the principle of res judicata, since it may be invoked in a subsequent case where the parties are entirely different. Neither is it an application of the rule known as the "law of the case," since the second suit may be an entirely independent proceeding. It is a true application of the doctrine of stare decisis. The working of the rule may be

[84] Succession of Lauve, 6 La. Ann. 529; Murphy v. Willow Springs Brewing Co., 81 Neb. 223, 115 N. W. 761; Wells, Fargo & Co. v. Northern Pac. R. Co., 2 Wash. T. 303, 5 Pac. 215; Sauer v. Steinbauer, 10 Wis. 370.

[85] Weaver v. Gardner, 14 Kan. 347.

[86] Miller & Lux v. Enterprise Canal & Land Co., 142 Cal. 208, 75 Pac. 770, 100 Am. St. Rep. 115.

seen in cases where one suit is brought as a "test case," to determine the rights of many persons depending on the same act or fact. But this is not its sole application, as may be seen from the following illustrations and examples. A former decision construing a particular will is not open to reconsideration, but will be taken as settling the questions involved, in a subsequent suit where the same question is presented under the same will, although the latter action may involve property not in litigation in the former suit, or may involve new or different parties.[37] So where several persons suffer loss or injury by the same accident, and the prime question of negligence is settled in the first suit, it will not be re-opened in others. Thus, a decision by the court of last resort, in an action by a wife alone for personal injuries, will, under the rule of stare decisis, control a subsequent action by the husband to recover for the same injuries, in so far as there is a substantial identity in each case.[38] In proceedings for the infringement of a patent, where its validity is put in issue on the ground of want of novelty and prior use, a former decree of the court in other proceedings, involving the same issue, and sustaining the patent, will be held conclusive, under the doctrine of stare decisis, notwithstanding the action is against a different defendant.[39] So where the court of last resort has decided certain questions relative to certain property, such decision becomes stare decisis as to such questions, when raised in a subsequent action between different parties on the same facts and respecting the same property.[40] When a decision has been made that a series of bonds issued by a municipality are valid and authorized by statute, the question cannot be reconsidered in a proceeding for mandamus to compel the municipality to collect a tax to pay a judgment entered on the bonds in favor of a bona fide pur-

[37] Johnson's Adm'r v. Citizens' Bank of Richmond, 83 Va. 63, 1 S. E. 705; Poultney v. Tiffany, 112 Md. 630, 77 Atl. 117; Dugan v. Hollins, 13 Md. 149. And see Russell v. Hartley (Conn.) 78 Atl. 320.

[38] Cawley v. La Crosse City Ry. Co., 106 Wis. 239, 82 N. W. 197.

[39] Zinsser v. Krueger (C. C.) 45 Fed. 572.

[40] O'Rourke v. Clopper, 22 Tex. Civ. App. 377, 54 S. W. 930. And see White v. Kyle's Lessee, 1 Serg. & R. (Pa.) 515.

chaser, who acquired title after the bonds had been adjudged valid.[41] A decision by the supreme court, after full consideration, as to whether a vacancy existed in the office of county supervisor, when immediately acted on by all the parties interested, in the ensuing election, will not be re-examined by the court in a mandamus case brought after the election.[42] So, where the only difference between two cases is that one is an appeal by part of the property owners from a judgment of confirmation of an assessment for a street improvement, and the other a writ of error by the other property owners, the decision on the appeal already rendered will control the second case submitted on the same record.[43] So where, in a suit on a receiver's bond against the principal and the surety, the surety sets up the same defense that was made by the receiver in a former case, and the facts depended upon to support it are the same, the decision rendered in the receiver's case will control the main question in the pending case.[44] And where, in a mandamus proceeding to compel the postmaster general to admit a publication to the mails as second-class matter, the court has placed an interpretation on the statute relating to such mail matter, that interpretation will be followed in a subsequent case, although the form of remedy pursued in the second case is different, namely, an injunction to prevent the postmaster general from revoking a certificate of entry of a publication to the mails as second-class matter, as the form of the remedy does not affect the question at issue.[45] In a case in Illinois, which was an action for partition, the defendants claimed title by virtue of certain trust deeds, and as a defense alleged the invalidity of the mortgage and foreclosure proceedings under which the plaintiffs claimed title. But it was held,

[41] State v. Bristol, 109 Tenn. 315, 70 S. W. 1031. And see Nininger v. Board of Com'rs of Carver County, 10 Minn. 133 (Gil. 106).

[42] In re Howard, 26 Misc. Rep. 233, 56 N. Y. Supp. 318.

[43] Hallissy v. West Chicago Park Com'rs, 177 Ill. 598, 52 N. E. 843.

[44] Fidelity & Deposit Co. of Maryland v. Nisbet, 119 Ga. 316, 46 S. E. 444.

[45] Columbian Correspondence College v. Wynne, 25 App. D. C. 149.

upon the principle of stare decisis, that the former opinion of the supreme court, adjudging the mortgage and foreclosure proceedings to be valid, was decisive of the question.[46]

DECISIONS ON QUESTIONS OF FACT OR EVIDENCE

64. A precedent is valuable and authoritative only as establishing a rule or principle of law. The rule of stare decisis has no application to findings of fact, and has a very limited application to cases which turn upon the admissibility or weight of evidence, or upon the application of settled legal principles to the facts established in the particular controversy.

The decision of a question of fact is based upon the evidence presented in the particular case. The same question of fact may recur in a subsequent case, but the evidence may then be entirely different and lead irresistibly to a different conclusion. Now the doctrine of precedents is not concerned with matters of this kind. The rule of stare decisis inculcates a steady adherence to a rule or principle of law once laid down as applicable to a given state of facts, when the same state of facts shall recur, but has nothing to do with the establishment of the facts themselves. Hence a judicial decision which merely finds the existence of certain facts has no value or authority as a precedent.[47] Further, since every decision implies the ap-

[46] McCormick v. Bauer, 122 Ill. 573, 13 N. E. 852.

[47] Stern v. Fountain, 112 Iowa, 96, 83 N. W. 826; McWilliams v. Bonner, 69 Ark. 99, 61 S. W. 378; German Protestant Orphan Asylum v. Barber Asphalt Pav. Co., 82 S. W. 632, 26 Ky. Law Rep. 805; Adams v. Clapp, 99 Me. 169, 58 Atl. 1043. But see Morgan's Heirs v. Parker, 1 Dana (Ky.) 444. In a divorce action, the question of what is a fair division of property depends largely upon the facts of each individual case, and former precedents are valuable guides only when they rest on facts substantially similar to those under consideration. Minahan v. Minahan, 145 Wis. 514, 130 N. W. 476.

plication of a rule or principle of law to the particular facts involved in the case before the court, the scope of a precedent is to be very carefully limited in those cases where the only essential dispute is as to the facts. Thus, for instance, general expressions in an opinion of an appellate court concerning recoverable damages are to be taken in connection with the facts of the case in which they occur, and are not to be extended to other cases which are fairly subject to the operation of a different principle.[48] So, precedents in negligence cases must be limited to the points actually decided on the particular facts before the court.[49] For similar reasons precedents for the admission or exclusion of evidence must be read, not only with reference to the issues made by the pleadings in the particular case, but also in the light of the other evidence adduced.[50] For similar reasons, again, the fact that the instructions given in one case were approved on appeal does not justify the conclusion that they are applicable to another case, for the instructions in each case must present the law as warranted by the evidence.[51] So also, decisions of appellate courts which turn upon the comparative weight of testimony are seldom of any value as precedents.[52]

LIMITATIONS OF RULE; DECISION MANIFESTLY ERRONEOUS

65. The principle of stare decisis does not prevent a court from overruling a previous decision which shall appear to it to be plainly and palpably wrong, where this course can be taken without inflicting

[48] Mason City & Ft. D. R. Co. v. Wolf, 148 Fed. 961, 78 C. C. A. 589.

[49] Wankowski v. Crivitz Pulp & Paper Co., 137 Wis. 123, 118 N. W. 643.

[50] Hanson v. Johnson, 141 Wis. 550, 124 N. W. 506.

[51] Illinois Cent. R. Co. v. France's Adm'x, 130 Ky. 26, 112 S. W. 929.

[52] Reed v. Reed, 114 Mass. 372.

serious injury on any person, or where greater harm would result from following the erroneous decision than from reversing it.

The rule of stare decisis is admitted to be subject to this limitation, that if a prior decision is clearly erroneous, whether from a mistaken conception of the law or through a misapplication of the law to the facts, and especially if it is injurious or unjust in its operation, while no injurious results would be likely to flow from a reversal of it, it is not only an allowable departure from the rule of stare decisis, but it is the imperative duty of the court, to overrule it.[53] "The doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that, in such cases, it is the duty of courts to re-examine the question."[54] The same idea was forcibly expressed by a learned judge in Pennsylvania, where, after laying down the general principle of adherence to judicial precedents, he observed: "Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. A palpable mistake, violating justice, reason, and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention that they demand reconsideration. There are some

[53] McFarland v. Pico, 8 Cal. 626; Paul v. Davis, 100 Ind. 422; Remey v. Iowa Cent. Ry. Co., 116 Iowa, 133, 89 N. W. 218; Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136; State v. Hill, 47 Neb. 456, 66 N. W. 541; Ex parte Woodburn (Nev.) 104 Pac. 245; Linn v. Minor, 4 Nev. 462; Brennan v. Mayor, etc., of City of New York, 47 How. Prac. (N. Y.) 178; Romaine v. Kinshimer, 2 Hilt. (N. Y.) 521; State ex rel. George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; Sydnor v. Gascoigne, 11 Tex. 449; Kneeland v. City of Milwaukee, 15 Wis. 691.

[54] Rumsey v. New York & N. E. R. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600.

which must be disregarded because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion."[55] So also it has been remarked by the court in Georgia that, although courts of final review are bound by the rule of stare decisis, yet where a grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, it is not that rule which should be applied, but the maxim "fiat justitia, ruat cœlum."[56]

But the fault or error in the former decision must not be open to serious question. No court is justified in overruling one of its former decisions, especially one affecting private rights, merely because it now entertains a doubt of its correctness.[57] This course can be taken only when the judges can say without any doubt or hesitation that the earlier decision was wrong, or, as the courts frequently put it, when it is "palpably" erroneous.[58] And even when its incorrectness is too plain to escape detection, there is a further question to be taken into account before deciding to overrule it, namely, the consequences of such a course with reference to public and private rights. If the decision has become a rule of property, it is frequently considered necessary to let it stand unreversed, no matter how erroneous it may now be deemed, as will more fully appear in a later chapter.[59] On the other hand, when the correction of the error will not inflict serious injury on any person or his rights, that is a good reason for setting right the law by overruling the previous decision.[60] So also, where the perpetuation of the mistake will work material harm to public and private rights. As pointed out by the court in North Carolina, the rule of stare decisis is founded on public pol-

[55] McDowell v. Oyer, 21 Pa. 417, 423.
[56] Ellison v. Georgia R. Co., 87 Ga. 691, 13 S. E. 809.
[57] State v. Silvers, 82 Iowa, 714, 47 N. W. 772.
[58] Lemp v. Hastings, 4 G. Greene (Iowa) 448; Law v. Smith, 34 Utah, 394, 98 Pac. 300.
[59] See infra, Chapter V, "Rules of Property."
[60] Law v. Smith, 34 Utah, 394, 98 Pac. 300.

icy. But public policy is intimately concerned with the general welfare; and the rule does not require a court to adhere to a decision, clearly erroneous, which injuriously affects a general business law.[61] So the court in Missouri, speaking of one of its former decisions, says: "But Stephens' Case [96 Mo. 637, 10 S. W. 172] is not law. It stands alone, and is at war with first principles and fundamental ideas, and with everything hitherto written on the subject; so that we are constrained to overrule it. To approve it would be to recognize the anomalous doctrine of accidental self-defense." [62] So again, the court in California overruled a previous decision as to the validity of a "quotient verdict," in an opinion in which it was said: "Counsel for respondent, with good reason, rely upon Turner v. Water Co., 25 Cal. 397, to support his contention in this regard. It is there decided that a verdict arrived at in the manner hereinbefore set forth is not a chance verdict, and therefore cannot be attacked by the affidavits of jurors. But, after mature consideration, we think the principle there declared erroneous, and that the establishment of a contrary rule, in this country especially, where the rights of property, reputation, and life are all taken into the jury room, and there passed upon by jurors, will result in a purer and more satisfactory administration of justice." [63]

But it is better, when prior decisions must be overruled, to hold that the reversal of the rules which they established shall not be allowed to retroact so as to overturn acts done and contracts made in good faith and in reliance on those decisions. Many of the courts are disposed to maintain this doctrine, and especially in the case where the earlier decision turned upon the construction of a statute or established a rule of property.[64]

[61] Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635.

[62] State v. Smith, 114 Mo. 406, 21 S. W. 827.

[63] Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180.

[64] See Hardigree v. Mitchum, 51 Ala. 151.

REASONS FOR AND AGAINST OVERRULING FORMER DECISION

66. The following are reasons which are properly influential in inducing a court to overrule one of its former decisions:

(a) That it was an isolated decision, which has not been followed or acquiesced in, and is now deemed erroneous.

(b) That the decision was rendered by a divided court, concerned a matter of great importance, and is now seriously doubted.

(c) That it has been received with general dissatisfaction and submitted to under protest and severely criticised and that its authority is questionable.

(d) That it is contrary to plain and obvious principles of law, provided it has not become a rule of property or been followed in numerous subsequent cases.

(e) That it was an innovation and is contrary to the rule of law on the same subject which is of practically universal acceptance in all other jurisdictions.

(f) That the rights or interests of the state or its municipalities, or of the general public, are injuriously affected by the decision in question, but no private rights depend upon its maintenance, and it is erroneous.

(g) That the decision was wrong and produces general inconvenience or injustice, and that, although some private rights may be injured by overruling it, yet less harm will result from that course than from allowing the decision to stand.

67. But the fact that the application of a well-settled rule of law will work hardship in the particular case before the court is not reason for overruling the prior decisions or departing from them.

68. The following are reasons which should influence a court against overruling a former decision, notwithstanding the fact that it is now deemed erroneous or open to grave question:

(a) That it has stood unchallenged for a long period of years.

(b) That it has been approved and followed in many subsequent decisions of the same or other courts.

(c) That it has been universally accepted and acted upon and acquiesced in by courts, the legal profession, and the public generally.

(d) That it has become a rule of property.

(e) That contracts have been made, business transacted, and rights adjusted in reliance upon it, for such a length of time, or to such an extent, that more harm would result from overruling it than from allowing the original error to stand uncorrected.

Authority and Discretion of Courts

"The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court which is again called upon to consider a question once decided." [65] "That maxim, although entitled to great weight, does not furnish an absolute rule which can never be departed from. * * * To depart from a decision is undoubtedly an act by which a court incurs a high degree of responsibility; and it should certainly be satisfied that its course is such that the future judgment of the enlightened profession of the law will approve its determination. But when it is satisfied that an erroneous determination has been made, and that too without a full consideration of the merits of the question decided; when it sees that to correct it will render void no one's honest acts, nor disappoint any just expectations; when in short it is fully persuaded that

[65] Hertz v. Woodman, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001.

there is no one reason why such a decision should again be made, except that it was once made before, then I think a court would be sacrificing substance to shadow if it refused to correct its error. Nor do I believe that by so doing a court would disturb the public confidence in the stability of its judgments. Courts are not inclined, any more than men out of courts, to admit that they have erred; and where the administration of justice is public, and must proceed upon reasons assigned for every judgment, there is little danger from the exercise, under the responsibilities which necessarily attend its exercise, of the power which a court possesses to retrace its steps when it is satisfied that an error has been committed." [66] Nevertheless this power is not to be exercised except for very weighty and conclusive reasons,[67] nor without due attention to the consequences. The question of correcting a former judicial error and establishing the right rule of law is very seldom, if ever, a purely academic one. Almost invariably there are practical considerations of justice, convenience, and policy to be taken into account, over and above the theoretical importance of preserving the stability and certainty of the law. And above all, no court is justified in overturning a former decision unless thoroughly and entirely satisfied that it was wrong. On this point there must be no doubt. "We are constrained," says the court in North Carolina, "to abide by the decisions of the court, unless it be made to appear that there was palpable error or mistake. When there is room for construction, and reasons may be adduced on both sides of a matter in controversy, the certainty of a rule is of more importance, often, than the reason of it." [68] So also speaks the Supreme Court of West Virginia: "We should not overrule our former decisions unless we could give clear and cogent reasoning for the change. Confessedly the statute is somewhat obscure; and if we were to depart from our former decision, the reasoning to support

[66] Leavitt v. Blatchford, 17 N. Y. 543.
[67] Kapp v. Kapp, 31 Nev. 70, 99 Pac. 1077.
[68] Board of Education of Bladen County v. Board of Com'rs, 111 N. C. 578, 16 S. E. 621, 18 L. R. A. 850.

it would be no more satisfactory and free from doubt than the reasoning of the former decision." [69]

Isolated Decision

Where the precedent to be impeached is a single and isolated decision, it may be attacked with more confidence, and the court will be more disposed to overrule it, than in the case of a decision which has often been approved and followed at home and abroad. If it can be shown that such a case was not supported by good precedents or solid reasons, that it was not very fully considered, that it is of recent date, that it has not been generally acquiesced in nor approved elsewhere, and, above all, that it was clearly and indubitably erroneous, it will not only be proper, but it may be the imperative duty of the court, to overrule it at once,[70] and especially, it is said, where important public interests depend upon the right construction or application of the law.[71] On this point we find the following instructive remarks by the Supreme Court of Mississippi: "When a single case stands unsupported and rests upon an unsound basis or an erroneous application of principles, it is better to abandon it than to attempt to build upon it. Perhaps no general rule can be laid down on this subject. The circumstances of each particular case, the extent of influence upon contracts and interests which the decision may have had, whether it be only doubtful or clearly against principle, whether sustained by some authority or opposed to all,—these are all matters to be judged of whenever the court is called on to depart from a prior determination. When all this has been done, if no particular mischief is likely to ensue, we believe it to be our duty to decide according to our own convictions of the law." [72]

[69] State v. Baer, 37 W. Va. 1, 16 S. E. 368.

[70] Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 471; Smith v. Smith, 13 La. 441; Lagrange v. Barre, 11 Rob. (La.) 302; Griffin v. His Creditors, 6 Rob. (La.) 225; Kimball v. Grantsville City, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628.

[71] Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738.

[72] Garland v. Rowan, 2 Smedes & M. 631.

Divided Court

It has been ruled in Alabama that, where very important interests depend upon the right construction of a statute, and the last previous case dealing with the question was decided by a divided court, these are sufficient reasons for a re-examination of the question and a decision in accordance with the court's present conviction as to the law.[78]

Acquiescence or Disapproval

A court will be more easily persuaded (as appears from the authorities) to overrule a previous decision when it has not been "acquiesced in." The inferior courts of the same system are bound to follow the decision and have no option to acquiesce or not. And the same is true of the executive department, which must enforce the law as laid down by the judiciary. As for the legislature, if it did not acquiesce in the decision, it could simply change the law by a new statute. Hence the want of acquiescence spoken of must be on the part of the bar and of the general public. It appears, therefore, that if the decision in question has been subject to animadversion on the part of the legal profession, who have generally united in condemning it as erroneous; if it has been disapproved by courts in other jurisdictions; if there has been complaint, criticism, remonstrance, and a general feeling of dissatisfaction with it on the part of the public; if citizens have endeavored to circumvent the effect of the decision on their private affairs by so drawing their contracts and shaping their dealings as to evade it; or if, the decision relating to public officers or the conduct of public business, there has been a similar endeavor to avoid the conjunction of facts which would bring a case within the rule of the decision,—it will be proper to bring these circumstances to the notice of the court when asking it to overrule the previous decision. But of course this is not to say that courts should ever be influenced by mere popular clamor, or bend to the storm of political or sectional rage, nor even consent to reverse their previous decisions under the stress of criticism from

[78] Hand v. Stapleton, 145 Ala. 118, 39 South. 651.

any source whatsoever, unless they are satisfied judicially, and as a pure matter of law, that the former judgment was erroneous.

In illustration of the legitimate effects of purely legal criticism and "want of acquiescence," we may quote from two opinions, the first by the Supreme Court of Oregon, the second by the Court of Appeals of New York. In the former, referring to an earlier decision, it was said: "It is unnecessary to say that the logic of that decision was not appreciated by the members of the bar; but its doctrine was enforced until the people of the various counties got tired of having to pay the damages to unscrupulous claimants, * * * and the legislature concluded to change it. * * * The evident object of this amendment was to escape from the pernicious consequences resulting from the decision * * * the soundness of which, in the opinion of a number of attorneys, was at least doubtful." [74] The New York court, speaking of a construction of a statute made in an earlier case, said: "So far as this construction has been followed, the submission has been under protest and accompanied by more or less of evident discontent. * * * We deem it proper to overrule Ritten v. Griffith [16 Hun, 454], and relieve the courts which have doubted its construction from the embarrassment of its authority." [75]

Decision Contrary to Principle

Cases sometimes occur in which a decision, or even a series of decisions, should be overruled merely on the ground that the rule announced therein is contrary to principle and to sound legal reason. For an erroneous decision always works harm, since it necessarily fails to do justice, and the prepetuation of injustice is contrary to the prime duty of the courts. There is therefore an evil to be corrected, when a former decision is shown beyond question to have been incorrect, and if no countervailing injury will result from overturning it, the court should not stay its

[74] Grant County v. Lake County, 17 Or. 453, 21 Pac. 447.
[75] In re Field, 131 N. Y. 184, 30 N. E. 48.

hand merely from a blind reverence for precedent. Mere precedent alone, according to the court in Ohio, is not sufficient to establish a legal principle which is not founded on sound reason and does not tend to the purposes of justice.[16] And so one of the federal courts, speaking of the rule of stare decisis, observes: "This rule should, in the main, be strictly adhered to. An adherence to it is necessary to preserve the certainty, the stability, and the symmetry of our jurisprudence. Nevertheless, there are occasions when a departure from it is rendered necessary in order to vindicate plain and obvious principles of law, and to remedy a continued injustice. These are the two grounds of justification in departing from a decision which has become a precedent." [17] But if the erroneous decision has become a rule of property, if the rights of parties in respect to their contracts, their business transactions, and their titles, are founded upon it, and would be injuriously affected by its reversal, another element enters into the problem, and it may be the duty of a court not to disturb the rule as settled, however doubtful of its original propriety.[18]

Decision Contrary to Weight of Authority

The rule of stare decisis should not be allowed to stand in the way of any wholesome reform of the law. There may be cases in which it is better for a court to abandon its own former decisions, when they do not constitute a rule of property, and when they can be overruled without disturbing vested rights, for the purpose of bringing the law of the state into conformity with the general law of the same subject as settled by the course of decisions in other states and in the federal courts. This is especially the case in regard to the law of negotiable paper and of commercial transactions generally, where it is better not to

[16] Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334. And see Commonwealth v. Walsh, 196 Mass. 369, 82 N. E. 19, 124 Am. St. Rep. 559.

[17] The Madrid (C. C.) 40 Fed. 677.

[18] Board of Com'rs of Jasper County v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58.

perpetuate a purely local rule or usage, which is contrary to the rule prevailing in practically all other jurisdictions, and which is likely to produce confusion and conflicting rights where dealings with citizens of other states are involved. This was the position taken by the Supreme Court of Ohio, as early as 1841, when it refused to follow a previous decision of its own, which had given sanction to a local understanding of the rights of parties to accommodation paper contrary to the general rule recognized elsewhere. "In the law of real property," said the court, "each state has its local rules and its own courts are competent to establish and maintain them. But in the law of contracts, especially mercantile contracts, the principles are nearly uniform throughout the civilized world. They are established by a wider experience, and are maintained in a greater uniformity, in consequence of the great number of tribunals through whom they are expressed. Our state has become and is becoming the scene of large commercial operations, and it is of much moment that the principles on which justice is administered should be made to conform, as far as possible, to the general law merchant. The intrinsic propriety of this step is increased by remembering that the foreigner will find the general law merchant governing the tribunal which sits by our side [the federal court] and will obtain there a different rule of justice than our own citizen." [79] In this same line of reasoning, it was said by the Supreme Court of California that the doctrine of stare decisis should rather lead it to conform to a principle of mercantile law, established all over the world, than to follow a decision of its own, made only a few years before, which was a very decided and probably injudicious innovation upon that principle.[80]

Rights and Interests of State Involved

It is said to be especially proper for the courts to overrule previous decisions, being clearly satisfied of their incorrectness, where the rights, the dignity, or the sovereign-

[79] Williams v. Bosson, 11 Ohio, 62.
[80] Aud v. Magruder, 10 Cal. 282.

ty of the state is concerned, and no rule of property is involved in such wise that private parties would be injured by their reversal. Thus one suing a board of state officers, to restrain a breach of contract, cannot complain because the court decides that the suit is in reality against the state and therefore not maintainable, although it overrules a prior decision wherein it was held that just such an action could be sustained.[81] So also it is said that the rule of stare decisis may properly be departed from in a case involving the question whether the state has alienated its right to tax a private corporation.[82]

Beneficial and Injurious Consequences Weighed

A former decision may properly be overruled, if it is clearly shown to have been erroneous, even where it has come to be regarded as a rule of property, where the loss or injury which must accrue to individuals will be more than overbalanced by the beneficial results to be expected from establishing the law on a right basis, or where the consequences to be apprehended from overruling it are less disastrous than would result from adhering to it; as, where the false rule has resulted in mischief rather than benefit to a large class of the community, or in general and widespread inconvenience, or has interfered with the natural course of trade and commerce or tended to promote a monopoly, or where a revival or enlargement of industry and business will result from abolishing it.[83] In these and similar cases, neither the general rule of adherence to precedents, nor a private and local injury to a comparatively small number of individuals, should be allowed to obstruct the reform of the law by the overruling of the erroneous decision. This was the argument of the court in Rhode Island in a case where, speaking of one of its own

[81] Pitcock v. State, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88.

[82] Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200, 60 L. R. A. 33.

[83] McEvoy v. City of Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; City of Wahoo v. Nethaway, 73 Neb. 54, 102 N. W. 86; McFarland v. Pico, 8 Cal. 626; City and County of San Francisco v. Spring Valley Waterworks, 48 Cal. 493.

former decisions, it was said: "The question is, shall we adhere to it out of regard to the maxim stare decisis, or shall we adopt what we now consider the sounder rule? We have come to the conclusion that, considering how recently the case was decided, very little harm will come from overruling it, and that by doing so we shall not only establish the correct rule, but also, which is no inconsiderable gain, establish the rule which is generally prevalent elsewhere." [84]

Hardship in Particular Cases

It is no sufficient reason for disregarding or overruling a prior decision, which correctly laid down the general rules of law on the subject, that its application to the particular case before the court will work hardship or even injustice. In the infinite variety of cases which come before the courts, there must sometimes be instances in which the enforcement of a general rule of law, sound and salutary in the main, will bear heavily on the suitor and cause unmerited suffering. Yet if the courts, for this reason, permit themselves to deviate from the rule of strict adherence to precedent, they may relieve the individual, but they injure the body of the law. This is expressed in the common saying that "hard cases make bad precedents." [85] "This case may be a hard one," said the court in California, "but it forms no reason why the former decisions should be disregarded. The frequent instances in which courts have relaxed rules to avoid the consequences of cases like this have done more to confuse and complicate the law, and destroy its beauty and symmetry, than all other causes put together. A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will prove more beneficial than if constantly deviated from." [86] This is even more strongly put by Lord Chancellor Loughborough, as follows: "If there is a general hardship affecting a general class of cases, it is a con-

[84] Allen v. Danielson, 15 R. I. 480, 8 Atl. 705.
[85] State v. Granville Alexandrian Soc., 11 Ohio, 1, 14.
[86] Giblin v. Jordan, 6 Cal. 416.

sideration for the legislature, not for a court of justice. If there is a particular hardship from the particular circumstances of the case, nothing can be more dangerous or mischievous than, upon those particular circumstances, to deviate from a general rule of law. The consequence is that law ceases to be a system." [87] And so by Lord Penzance: "The court is not permitted to indulge its feelings at the expense of unsettling the law, or to break with the decided cases to sympathize with the petitioner's misfortunes." [88] Nevertheless the courts are not entirely precluded from considering hardship as a reason for overruling a previous decision, if they have serious judicial doubts of its correctness. And the fact that the rule announced results in hardship, not merely in the one particular case, but at least conceivably in all or a majority of the cases which may come within its operation, may be regarded as strong evidence that the original decision was not correct in law, for the law does not intend injury nor tolerate injustice. Hence it is said that if a former decision of the same court is considered to be radically unsound, and is seen to establish a hardship not within the contemplation of the law, while no injurious results will follow from overruling it, the principle of stare decisis does not apply.[89]

Reasons for Refusing to Overrule

The fact that a decision has been long accepted as settling the law, and has frequently been followed and applied, is a sufficient reason for declining to overrule it, notwithstanding the fact that the court would have reached a different conclusion if the case were freshly before it, and although it may consider the necessity of adhering to that decision as a juridical misfortune.[90] A few quotations from opinions will show how the courts regard this problem. "We yield to the decision in that case with reluc-

[87] Brydges v. Duchess of Chandos, 2 Ves. Jr. 426.

[88] Brown v. Brown, L. R. 1 Prob. & Div. 46, quoted in Shutt v. Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519.

[89] Kelley v. Rhoads, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904.

[90] Jansen v. City of Atchison, 16 Kan. 358.

tance, because we are strongly impressed with the belief that it was not well decided." [91] "It must be confessed that a rather illiberal view of the statutes has obtained, which, however, must now be adhered to." [92] "I may lament the unsatisfactory state of our law, * * * but I am here only to declare the law." [93] "This rule, being now established, must be adhered to, although it is not founded upon truly rational grounds and principles, nor upon the intent [of a testator] but upon legal niceties and subtilty. We must not depart from it now, nothwithstanding one would wish that no such rule had ever been established, and lament that such nice subtilties should ever have been admitted as the ground of it." [94]

While mere lapse of time alone will not suffice to clothe an erroneous decision with such sanctity that it cannot be overruled, yet the fact that it has stood unchallenged or uncriticised, as the law of the state, for a long period of years, will constitute a very powerful argument against the propriety of disturbing it.[95] This is especially true if the original decision has been approved and followed in subsequent cases,[96] as, where the same court has "persistently declared" its approval of the rule of law announced in the decision.[97] Thus, in a case in Michigan, on a question arising in the law of master and servant, Judge Cooley said: "The case is directly within Quarman v. Burnett, 6 Mees. & W. 499, which, whether correctly decided or not, has been too often and too generally recognized and follow-

[91] Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

[92] Croan v. Phelps' Adm'r, 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753.

[93] Lynch v. Knight, 9 H. L. Cas. 592, per Lord Brougham.

[94] Roe v. Griffits, 4 Burr. 1960, per Lord Mansfield.

[95] Davidson v. Biggs, 61 Iowa, 309, 16 N. W. 135 (fifteen years); Wells v. Adams, 88 Mo. App. 215 (twenty years); Hollywood Lumber Co. v. Love, 155 Cal. 270, 100 Pac. 698 (twenty-five years); Gee v. Pritchard, 2 Swanst. 450 (forty years).

[96] In re Gray's Estate, 147 Pa. 67, 23 Atl. 205.

[97] Hawkinson v. Oatway, 143 Wis. 136, 126 N. W. 683, 139 Am. St. Rep. 1091.

ed to be questioned now." [98] So, Lord Mansfield once remarked, concerning a certain decision in chancery: "It is a shocking decision, but it has been followed by a hundred others." [99]

In much the same way a decision gains force, and is less and less likely to be overruled, if it is generally accepted and acquiesced in for a long period of time, without any technical professional criticism or any fresh inquiry into the basis on which it rests. This is illustrated by a decision of the court in New Jersey, when called upon to reconsider the rule that the burden of proving insanity as a defense in a criminal case rests upon the accused. It was said: "After such an inveterate and universal acceptance of a rule of practical importance and frequent application, it must be considered that the time has passed for testing its correctness by the criterion of speculation. If such a rule of evidence, after so conspicuous and protracted an existence, is to be pushed aside, or even is to be considered liable to challenge on theoretic grounds, it is difficult to divine upon what stable basis the administration of the law is to be conducted. Very many of the legal regulations which belong to the trial of causes, both criminal and civil, are the creatures of custom and usage, and if such regulations, after having been unquestioned and enforced for half a century, are to be deemed, with respect to their legality, subject to assault, the utmost uncertainty and confusion would be introduced." [100] So also, Lord Eldon is reported to have said: "If I find doctrines settled for forty years together, I will not unsettle them. I have the opinion of Lord Hardwicke and Lord Apsley, pronounced in cases of this nature, which I am unable to distinguish from the present. These opinions have been acquiesced in without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I might entertain, I

[98] Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54.

[99] Morgan v. Surman, 1 Taunt. 289.

[100] Graves v. State, 45 N. J. Law, 203.

will lend it only when the parties bring them into question before the House of Lords." [101]

If a judicial decision announces a rule of law which is contrary to the general understanding of the legal profession or the public, or is productive of hardship or injustice, it is always in the power of the legislature to counteract its effect, and to establish the law on a sound and satisfactory basis, by the enactment of a new statute. If the legislature refrains from doing this, and particularly if a number of years pass without any effort being made to change the law in this manner, the courts always regard this as a strong reason why they should refuse to disturb the original decision, whatever doubts of its correctness they may now entertain. Thus it is said in Iowa that a decision of the supreme court construing a statute, which construction has met the approval of each successive legislature for over twenty years, should not be departed from.[102] So again, by Judge Cooley: "The defense insist that this decision was erroneous, and we are urged to review it. If serious mischief could arise from it, we might be inclined to do so. * * * The rule as laid down * * * has been recognized and acted upon for more than twenty years and if known evils had sprung from it, we must suppose the legislature would have taken notice of them and applied the remedy." [103] So, in a case in Missouri, it was said by a learned judge, with reference to a former decision of the same court: "When we confess that it once was the law and fully sustained by authority, * * * it does seem the rule ought to be changed by the legislature, and when we consider that, as a matter of recent history, the legislature has refused to make the change, it furnishes an additional reason why we ought not." [104]

Finally, if the original decision, whether right or wrong, has become a rule of property, or has entered into the con-

[101] Gee v. Pritchard, 2 Swanst. 450.

[102] Robey v. State Ins. Co., 146 Iowa, 23, 124 N. W. 775.

[103] People v. Wilson, 55 Mich. 506, 21 N. W. 905.

[104] Schlereth v. Missouri Pac. Ry. Co., 115 Mo. 87, 21 S. W. 1110, dissenting opinion of Gantt, J.

tracts and dealings of parties; if business has been adjusted with reference to the rule which it announced; if titles have been created, incumbered, and transferred in reliance on it as a correct exposition of the law; if securities have been negotiated on the faith of it and have passed into the hands of bona fide holders; and if this has continued for a considerable length of time,—then it becomes almost the imperative duty of the court to adhere to the former decision and resist all attempts to unsettle it.[105] To overrule such a decision would invalidate all titles and transactions founded on it, and this is an evil not to be contemplated without dismay. It is far better to perpetuate a judicial error than to inflict such harm on individuals. "The maxim stare decisis has greater or less force according to the nature of the question decided. There are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability in the law. These are questions where the decisions did not constitute a business rule, and where a change would invalidate no business transactions conducted upon the faith of the first adjudication. As an illustration, take a case involving personal liberty. A party restrained of his liberty claims to be discharged under some constitutional provision; the court erroneously decides against him; the same question arises again. To change such a decision would destroy no rights acquired in the past; it would only give better protection to rights in the future. The maxim in such a case would be entitled to very little weight, and mere regard for stability ought not to be allowed to prevent a more perfect administration of justice. But where a decision relates to the validity of certain modes of doing business, which business enters largely into the business transactions of the people of a state, and a change of decision must

[105] McDonald v. Millaudon, 5 La. 403; Roof v. Charlotte, C. & A. R. Co., 4 Rich. (S. C.) 61; Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Chase v. City of Superior, 134 Wis. 225, 114 N. W. 437; Sydnor v. Gascoigne, 11 Tex. 449, 455; Miles v. National Bank of Kentucky, 140 Ky. 376, 131 S. W. 26.

necessarily invalidate everything done in the mode prescribed by the first, then, when a decision has once been made and acted on for any considerable length of time, the maxim becomes imperative, and no court is at liberty to change." [106] For the same reasons it was said in an English case: "This was settled by Longbottom v. Berry, L. R. 5 Q. B. 123, which was decided nearly fifteen years ago, and no doubt ever since then every deed by which machinery like this has been mortgaged in the north of England has been made on the faith of that decision. We are asked now to say that that case was decided on admitted facts, and that those facts were wrongly admitted, and that we should interpret such deeds differently from the way in which the court of Queen's Bench interpreted the deed. For my own part, I should decline now to alter the interpretation, if I thought the decision in Longbottom v. Berry was wrong." [107]

EXTREMES TO BE AVOIDED

69. In applying the maxim stare decisis, the courts should be influenced neither by excessive conservatism nor by extreme radicalism, but by moderation, right reason, and good sense, having regard, on the one hand, to the importance of keeping the law certain and stable, and, on the other hand, to its necessary development as a living and growing science.

The progress of the law and the just and accurate administration of its commands are not promoted either by a blind and unreasoning adherence to precedent nor by a lax disregard of the settled principles. Between these two extremes, equally undesirable, the courts must find the path of safety and justice. "The doctrine of stare decisis must retain some respect in the courts of this country, or

[106] Kneeland v. City of Milwaukee, 15 Wis. 691.

[107] Sheffield & S. W. Permanent Building Soc. v. Harrison, 51 Law Times (N. S.) 649, per Brett, M. R.

the innovating spirit of the age will render very insecure the rights of persons and property." [108] On the other hand, this maxim is founded on reason, and it should not be so applied as to banish reason from the law.[109] "Mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. Precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation." [110] "Always to defer to precedent would be practically to assert the infallibility of the judge who rendered the first decision. And that judges have not in fact always awaited the action of the legislature is sufficiently established by the numerous volumes of reversed cases in the libraries, and the list of doubted or overruled cases in the digests." [111] The philosophy of moderation in this respect is very well explained by the Supreme Court of Pennsylvania, in an opinion from which we quote as follows: "That doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institution of positive law, is among the most important principles of good government. But like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes. The conservatism which would make the instance of today the rule of tomorrow, and thus cast society in the rigid molds of positive law, in order to get rid of the embarrassing but wholesome diversities of thought and practice to belong to free, rational, and imperfect beings, and the radicalism that, in ignorance of the laws of human progress and disregard of the rights of others, would lightly esteem all official precedents and general customs that are not measured by its own idiosyncrasies, each of these extremes always tends to be converted into the other, and both stand rebuked in every volume of our

[108] Calkins v. Long, 22 Barb. (N. Y.) 106.
[109] City of Cincinnati v. Taft, 63 Ohio St. 141, 58 N. E. 63.
[110] Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334.
[111] Ram, Legal Judgment (Townsend's Ed.) p. 201.

jurisprudence. And the medial aspect of the doctrine stands everywhere revealed as the only practical one. Not as an arbitrary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belong to the science and natural instinct and common feeling of right; not as withholding allowance for official fallibility and for the changing views, pursuits, and customs that are caused by, and that indicate, an advancing civilization; not as indurating, and thus deadening, the forms that give expression to the living spirit; not as enforcing the 'traditions of the elders' when they 'make void the law' in its true sense; nor as fixing all opinions that have ever been pronounced by official functionaries; but as yielding to them the respect which their official character demands, and which all good education enjoins." [112]

CONFLICTING DECISIONS

70. As between two conflicting decisions of the same court on the same point, the general (but not invariable) rule is to follow the later and reject the earlier.

When two or more decisions upon the same point or question of law have been rendered by the same court in which the question again arises, or by a court whose decisions are binding upon the court which is called upon to solve the question, and such earlier decisions are found to be contradictory or conflicting with each other, the general rule is to follow the latest decision and disregard the others. This is because the later case must be supposed to have overruled the earlier and to stand as the final expression of the court's opinion.[113] But this rule is not invariable. There may be cases in which the earlier decision should be preferred. If that case, in comparison with the later case, is seen to be more consonant to legal principle and right reason, or more correctly decided on the facts in-

[112] Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 474.
[113] See Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961.

volved, or to have been more thoroughly argued at the bar and considered by the court, or, generally, to be the stronger and more satisfactory authority, the court may feel impelled to adopt and follow it, at the expense of overturning the later decision.[114] Thus, when the precedent on which reliance is placed is an isolated decision of the same court, made only a few years before, and which did not follow the previous course of decisions, but on the contrary departed from them and overruled them, and the court is now satisfied that the earlier decisions were right in law, and the later case wrong, it is not only permissible, but it is the duty of the court, to overrule that later case and restore the law to its former correct basis.[115]

[114] Bloom v. Richards, 2 Ohio St. 387, 405.

[115] Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 474; Groesbeck v. Golden (Tex.) 7 S. W. 362.

CHAPTER IV

CONSTITUTIONAL AND STATUTORY CONSTRUCTION.

71. General Principle.
72. Construction and Interpretation of Constitutions.
73. Decisions on Constitutionality of Statutes.
74. Construction and Interpretation of Statutes.
75. Re-enacted Statutes.

GENERAL PRINCIPLE

71. The considerations which induce the courts to adhere steadily to precedents, and not to change their former decisions except for the very strongest reasons, are not restricted to matters relating to the common law, but are equally applicable to questions arising upon the construction and interpretation of the written laws.[1]

CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS

72. The principle of stare decisis applies with special force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons.

The stability of many of the most important institutions of society depends upon the permanence, as well as the cer-

[1] For the doctrine of precedents, as applicable to the decisions of the courts of another state construing its constitution and statutes, see infra, p. 386. Decisions of United States Supreme Court on the constitutional validity and interpretation of state statutes, see infra, p. 318. Decisions of federal courts on the construction and application of the federal constitution and laws, see infra, p. 336. Federal courts following decisions of state courts on the construction of the constitution and laws of the state, see infra, p. 538.

tainty, of the construction placed by the judiciary upon the fundamental law. Hence, when the meaning of the constitution upon a doubtful question has been once carefully considered and judicially decided, every reason is in favor of a steady adherence to the authoritative interpretation. Former decisions should not be departed from merely because the court, as at present constituted, entertains a different opinion as to the meaning or application of a given provision of the constitution from that announced by its predecessors. Here, especially, the rule should be "stare decisis et non quieta movere." [2] Still less should the courts be willing to overrule the solemn adjudications of a former day in compliance with changed political opinions or a supposed new spirit of the times or new theories of government. The present writer, in another work, has pointed out the impropriety of evading or annulling the plain provisions of a constitution by the process of judicial construction, and the same remarks are equally applicable to the process of overruling or "distinguishing" away the force of earlier decisions which settled the interpretation of the constitution in plain terms and on a stable basis. It was there said: "Where the purpose and intent of the framers of the constitution are clearly expressed, they should be followed by the courts, without regard to any changes in public opinion on questions of policy or of the inconvenience resulting from following the constitution. A constitution may become antiquated. Its somewhat primitive provisions may be regarded as no longer adequate to the efficient administration of government. New political theories may have come into existence and may have been generally accepted. The increasing complexity of modern

[2] Maddox v. Graham, 2 Metc. (Ky.) 56; Seale v. Mitchell, 5 Cal. 401; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; In re City of Seattle (Wash.) 113 Pac. 762. But compare Burke v. Hinton, 77 Va. 1, where it is said that if a decision is wrong, it is only when it has been so long the rule of action that time and its continued application as the rule of right between parties demand the sanction of its error that the doctrine of stare decisis applies, and it is not applicable to questions of the construction of the organic law.

life, on its industrial, commercial, and social sides, may appear to require a new order of fundamental rules and principles. The distribution of powers and functions, as between the several departments of the government, or as between the constituent members of the state or nation, may seem to be no longer adapted to the successful realization either of the ideals of the people themselves or the policies or plans of their executive magistrates or their legislative assemblies. From any or all of these causes real hardships may result, to say nothing of hindrances and obstructions, if the courts persist in interpreting the constitution according to its plain and literal import. But that is their imperative duty. A constitution is not pliable. The people that made it may always revise and amend it. But courts would be flagrantly unfaithful to their high trust if they allowed their views of the meaning of the constitution to fluctuate with changes in popular sentiment, or bend to the wishes of either the executive or the legislative branch of the government." [3] For similar, and perhaps even stronger, reasons, a construction formerly placed upon a provision of the constitution will not be set aside in deference to the supposed views of the framers of the constitution, expressed in the debates of the convention, when the interpretation given by the decision in question is considered by the court to be in plain accordance with the evident meaning of the words finally adopted.[4]

It is said that the principle of stare decisis, as applied to the construction and interpretation of the constitution, is specially imperative when the former decisions were rendered at an early day and have long been considered as settling the law, and have been acquiesced in and acted upon by the other departments of the government, as well as the courts,[5] or where the question involves the validity of contracts, the protection of vested interests, the rights of innocent parties, or the permanence of a rule of prop-

[3] Black, Interp. Laws (2d Ed.) p. 36.

[4] Ex parte Smith, 152 Cal. 566, 93 Pac. 191.

[5] State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961; State v. Sanders, 42 Kan. 228, 21 Pac. 1073.

erty.[6] But the precedent, to be followed, must be entirely authoritative. Hence a practical construction placed upon any provision of the constitution by the judges of the inferior or intermediate courts is not controlling on the court of last resort.[7] And, as we have pointed out in another place, a legislative construction of the constitution, or a practical construction placed upon it by the executive or administrative officers of the government, while it is entitled to great weight and consideration in doubtful cases, cannot control the judgment of the courts and is not a direct precedent.[8]

It must be added that there are cases tending to restrict the application of this principle, in matters of constitutional interpretation, to questions involving rules of property or the property rights of private individuals. Thus it is declared by the Supreme Court of Texas that the rule of stare decisis applies when a decision has been recognized as a law of property, and conflicting demands have been adjusted, and contracts made with reference to it and on the faith of it, but not to questions involving the construction and interpretation of the organic law, the structure of the government, and the limitations upon the legislative and executive power as safeguards against tyranny and oppression.[9] So also, in another state, it is said that the doctrine of stare decisis has less force where the constitutional rights of a citizen to his personal liberty are involved than where property rights and the regularity of procedure are concerned.[10] And the Supreme Court of North Carolina has remarked that this doctrine, as applied to a given provision of the constitution, where it does not involve the rights of the citizen, should not be allowed to obstruct the carrying out of other provisions of the constitution intend-

[6] Maddox v. Graham, 2 Metc. (Ky.) 56; Angus v. Plum, 121 Cal. 608, 54 Pac. 97.

[7] Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

[8] Supra, p. 72.

[9] Willis v. Owen, 43 Tex. 41.

[10] Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242.

ed to promote the progress, prosperity, and welfare of the people generally.[11] To the same general effect is a declaration of the Supreme Court of the United States that, as it is clothed with the power and intrusted with the duty of maintaining the fundamental law of the constitution, it is not required, under the rule of stare decisis, to extend the scope of any decision upon a constitutional question, if it is convinced that error in principle might supervene.[12]

DECISIONS ON CONSTITUTIONALITY OF STATUTES

73. A judicial decision in favor of or against the constitutional validity of a statute or ordinance will be adhered to on the principle of stare decisis, so far as concerns the particular questions or objections adjudicated, though the court might now decide otherwise in the absence of any precedent, especially if the decision has been often followed or long acquiesced in, or if rights of property or of contract have grown up under it and depend upon it.

Notwithstanding occasional dicta to the effect that decisions on the meaning or application of the organic law have not the full force of precedents, or that "a constitutional question is never settled until it is settled right," it is now the generally accepted rule that, when the constitutionality of an act of Congress, a state statute, or a municipal ordinance is fairly attacked and fully adjudicated by the court of last resort, a decision sustaining its validity is to be adhered to, on the principle of stare decisis, and the questions involved are no longer to be considered as open to controversy.[13] It is immaterial that the court, as

[11] Collie v. Franklin County Com'rs, 145 N. C. 170, 59 S. E. 44.

[12] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.

[13] Commonwealth v. National Oil Co., 157 Pa. 516, 27 Atl. 374; Commonwealth v. Mill Creek Coal Co., 157 Pa. 524, 27 Atl. 375; Shoe-

constituted when a second attack upon the validity of the statute is made, may be doubtful of the correctness of the earlier ruling or might incline to a different view of the question involved. It is of the very essence of the doctrine of judicial precedents that the prior decision should be accepted and followed, in spite of the fact that the court would certainly be disposed to decide the question differently if it were a new one. Where the question is one of constitutional law, it would often happen, as remarked by the court in Vermont, that "a contrary decision would open the door to interminable litigation and mischief;" and therefore the specific points decided will be regarded as removed from further controversy, whatever may be the present opinion of the court.[14]

As any precedent gains in force from having been frequently followed or reiterated, so the constitutional validity of a statute is regarded as peculiarly guarded from further assault when it has been, not once only, but repeatedly and uniformly, sustained by the decisions of the courts.[15] And the same may be said of even a single decision when it has been several times recognized by the courts, or assumed to be correct, without any reinvestigation of the question, or has for a long time been accepted and acquiesced in by the legislative department, the judiciary, and the people generally.[16]

But if this is true of decisions on constitutional questions generally, it is especially applicable where a decision sustaining the validity of a statute has become the foundation of titles, the basis of private rights, or an essential element

maker v. City of Cincinnati, 68 Ohio St. 603, 68 N. E. 1; City of New Orleans v. Hermann, 31 La. Ann. 529; Charles v. Arthur (Sup.) 84 N. Y. Supp. 284; Amoskeag Mfg. Co. v. Goodale, 62 N. H. 66; Bogard v. State (Tex. Cr. App.) 55 S. W. 494.

[14] Gill v. Parker, 31 Vt. 610; Pennsylvania Co. v. State, 142 Ind. 428, 41 N. E. 937.

[15] Bothwell v. Millikan, 104 Ind. 162, 2 N. E. 959; McCullough v. Virginia, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382.

[16] State ex rel. Monroe Gravel Road Co. v. Stout, 61 Ind. 143; Brown v. Eagle Creek & L. W. L. Gravel Road Co., 78 Ind. 421; Ricketts v. Spraker, 77 Ind. 371.

in various public or private contracts and business transactions, so that numerous and important interests would be unsettled if not destroyed by its reversal, and hardship and injustice to many innocent persons would result. Here, if ever, the salutary rule of stare decisis should be applied.[17] Indeed, when these considerations are removed from the field, it may be said that the chief reason for adhering to former decisions is eliminated; and some of the courts are disposed to relax the severity of the rule, as applied to questions of constitutional law, when private rights are not involved. Thus, the Supreme Court of Indiana rules that, where the highest court of a state has decided that provisions of a special act of the legislature for the relocation of a county seat were constitutional, such decision, not being a rule of property, is subject to review in a new and independent action in which the constitutionality of such provisions is attacked.[18]

It should be remarked further that the courts are not to be precluded from passing upon the constitutionality of a statute unless the earlier decision, urged as a binding precedent, was an adjudication fairly and directly upon the very question of the validity of the statute, and disposed of the identical grounds of objection to its constitutionality now presented. Hence, if the case at bar involves and depends upon a direct attack upon the statute, in this respect, the decision will not be controlled by the fact that the same statute was assumed to be constitutional in various earlier cases, where the precise question was not raised,[19] nor merely by the fact that, in an earlier case between private citizens, the court dismissed an appeal from the inferior

[17] Hart v. Floyd, 54 Ala. 34; Allison v. Thomas, 44 Ga. 649; Maddox v. Graham, 2 Metc. (Ky.) 56; Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 355. And see Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698; Willis v. Owen, 43 Tex. 41; State ex rel. George v. City Council of Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

[18] Board of Com'rs of Jackson County v. State ex rel. Shields, 155 Ind. 604, 58 N. E. 1037. And see Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698.

[19] Virtue v. Board of Freeholders of Essex County, 67 N. J. Law, 139, 50 Atl. 360.

court, which had ruled the statute to be constitutional, the later action being brought by the state.[20] So again, a decision of the supreme court holding a statute to be valid and constitutional, when attacked on certain specific grounds in one action, will not prevent the same court from declaring it invalid when assailed in another action between different parties on other and different grounds.[21] We might suppose a case, for example, where the validity of a statute was sustained as against the objection that the legislature had not obeyed the directions of the constitution in regard to the form and manner of enacting it, or that its title did not correspond with the subject-matter. The decision would preclude any further inquiry into these same matters. But if, in a second case, between different parties, it were alleged that the statute was invalid because it impaired the obligation of contracts, or deprived citizens of their liberty or property without due process of law, the court would be in no way prevented by the first decision from fully considering and adjudicating these questions; because the effect of the first decision, as a precedent, must be strictly limited to the precise questions heard and determined. But there must be a real and substantial difference between the grounds of objection in the two suits. A court which has fully considered and deliberately sustained the validity of a given statute should not, and ordinarily will not, consent to enter upon a reconsideration of the entire question, in a different and later litigation, merely because counsel have discovered and present to it a new argument,—not a new ground of objection, but a new reason for insisting upon a ground of objection formerly urged,—which was not heard in the former case, unless, perhaps, where the new argument is of such convincing force as to compel the mind to believe, not only that the former decision was legally indefensible, but that it would

[20] Denney v. State ex rel. Basler, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

[21] City Council of Anderson v. Fowler, 48 S. C. 8, 25 S. E. 900; Allardt v. People, 197 Ill. 501, 64 N. E. 533.

be palpably wrong to permit it to stand.[22] We must also distinguish between a ruling on the constitutionality of a statute and a ruling on its construction or effect. Thus a decision that a given act of the legislature constitutes or embodies a contract, the obligation of which is protected from impairment by the constitution, and that therefore an act repealing the statute is void, does not estop or prevent the court from afterwards deciding that the former statute itself is unconstitutional and void.[23]

Substantially the same principles apply where the first decision, instead of sustaining the statute, pronounced it unconstitutional. The effect is ordinarily to destroy its vitality for all time and to preclude any further investigation of the question, especially where the decision has been repeatedly approved and followed, or where it has stood unquestioned for a long time, or where disastrous consequences to individuals or the public would result from a change of decision.[24] It should be remembered, in this connection, that if an act of legislation is adjudged unconstitutional and void, and public officers as well as the citizens generally govern themselves accordingly, a subsequent overruling of this decision must necessarily involve an adjudication that the statute was valid and an effective law at the date of its enactment and that it should have been obeyed during all the intervening time.

Whatever may have been the decision of the court of last resort in regard to the validity of the statute, whether it pronounced in favor of or against its constitutionality, its adjudication is imperatively binding, as a precedent, on all the inferior courts of the state, and the question is no longer an open one for such courts.[25]

[22] Hall v. City of Madison, 128 Wis. 132, 107 N. W. 31.

[23] Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200, 60 L. R. A. 33.

[24] Campbell v. Los Angeles Gold Mine Co., 28 Colo. 256, 64 Pac. 194; Hughes v. Hughes, 4 T. B. Mon. (Ky.) 42; State ex rel. Morgan County v. Wilder, 199 Mo. 503, 97 S. W. 864; Texas & P. Ry. Co. v. Mahaffey, 98 Tex. 392, 84 S. W. 646.

[25] Palmer v. Lawrence, 5 N. Y. 389; Wheeler v. Rice, 4 Brewst. (Pa.) 129.

CONSTRUCTION AND INTERPRETATION OF STATUTES

74. A settled judicial construction put upon a statute has practically the same authority as the statute itself; and although the courts have power to overrule their decisions and change the construction, they will not do so except for the most urgent reasons, and not at all where the previous decision has been repeatedly followed or long acquiesced in, or has become a rule of property.

It is an ancient maxim of the law that "legis interpretatio legis vim obtinet," that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law, by becoming, as it were, a part of the statute itself.[26] Hence the rule of adhering strictly to judicial precedents, or of stare decisis, as applied to questions of statutory construction or interpretation, has long been recognized by the courts, and is supported by many decisions, both English and American.[27] As observed by the Supreme Court of New York: "The court almost always, in deciding any question, creates a moral power above itself; and when the decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority, according to its various

[26] Beck v. Brady, 7 La. Ann. 1; State v. Thompson, 10 La. Ann. 122; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Branch, Principia (1st Am. Ed.) 76.

[27] Hammond v. Anderson, 4 Bos. & P. 69; King v. Younger, 5 Durn. & E. 449; King v. Inhabitants of Eccleston, 2 East, 299; Queen v. Chantrell, L. R. 10 Q. B. 587; In re Budgett, 8 Reports (Eng.) 424; People v. Albertson, 55 N. Y. 50; Wolf v. Lowry, 10 La. Ann. 272; State v. Thompson, 10 La. Ann. 122; City of New Orleans v. Poutz, 14 La. Ann. 853; Beck v. Brady, 7 La. Ann. 1; Seale v. Mitchell, 5 Cal. 401; Sheridan v. City of Salem, 14 Or. 328, 12 Pac. 925; Despain v. Crow, 14 Or. 404, 12 Pac. 806; Davidson v. Biggs, 61 Iowa, 309, 16 N. W. 135; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604.

applications in and out of the immediate case." [28] So, Lord Chancellor Cairns, speaking of revenue acts, remarks: "The object must be, above that of all other acts, to maintain them and to expound them in a manner which will be consistent, and which will enable the subjects of this country to know what exactly is the amount of the charge and burden which they are to sustain. I think that, with regard to statutes of that kind, above all others, it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty." [29] Indeed, the English cases go very far in the direction of holding that former decisions are binding as precedents,—especially when they have often been followed or have stood for a long time,—although their effect is to create a departure from an act of Parliament, or virtually to repeal it, to introduce exceptions never contemplated by the act itself, to render ineffectual its beneficial provisions, or even to promote, rather than lessen, the very evils against which the statute was directed.[30]

The importance of adherence to the general rule is seen in the fact that the judicial explanation of an obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. Hence, even although the court, when the question of the construction of the statute comes up a second time, should be satisfied that the original interpretation was founded in error, yet, if it is seen that great mischief would ensue from a change in the construction, the court will yield the construction which it would otherwise regard as the true one, in favor of that interpretation which has been universally received

[28] Bates v. Relyea, 23 Wend. (N. Y.) 336.

[29] Com'rs of Inland Revenue v. Harrison, L. R. 7 H. L. 1.

[30] See Ex parte Whitbread, 19 Ves. 209, 212; Reynolds v. Waring, 1 Younge, 350; Cook v. Rogers, 7 Bing. 443.

and long acted on.[31] More especially when the construction given to a statute has become what is called a "rule of property" (that is, a rule which enters into the formation of contracts, or under which titles have become fixed and upon the continuance of which rights of property depend, and to which the business of the people has become adapted), it should be adhered to, even though questionable, so long as the statute itself remains unchanged.[32] And the same opinion has been expressed with regard to the interpretation of statutes which involve questions of practice; decisions under which a practice has grown up, though erroneous, will still be followed.[33]

As in other cases, so in regard to questions of statutory construction, a decision gains force and weight as a precedent if it has been repeatedly followed or approved,[34] or if, during a considerable period of time, its doctrine has been accepted and acquiesced in by the Legislature and by the public generally or by those persons whose rights or dealings are more peculiarly affected by the statute.[35] In explanation of this last principle, it may be remarked that it is always in the power of the Legislature to correct what it may deem a mistaken or perverted interpretation of the language of its enactments, by a declaratory statute or by

[31] Van Loon v. Lyon, 4 Daly (N. Y.) 149.

[32] Day v. Munson, 14 Ohio St. 488; Aicard v. Daly, 7 La. Ann. 612; Farmer's Heirs v. Fletcher, 11 La. Ann. 142; Commonwealth ex rel. Auditor's Agent v. Louisville Gas Co., 135 Ky. 324, 122 S. W. 164. Compare Southern Pac. Co. v. Robinson, 132 Cal. 408, 64 Pac. 572, 12 L. R. A. (N. S.) 497. Where a contract is affected by a statute, a decision of the supreme court construing the statute before the contract was executed must control the decision in an action on the contract. United States Saving Fund & Investment Co. v. Harris, 142 Ind. 226, 40 N. E. 1072. So, in Windham v. Chetwynd, 1 Burr. 414, Lord Mansfield said that when solemn determinations, acquiesced in, had settled precise cases, and become a rule of property, they ought, for the sake of certainty, to be observed as if they had originally made a part of the text of the statute.

[33] Succession of Lauve, 6 La. Ann. 529.

[34] Wolf v. Lowry, 10 La. Ann. 272.

[35] Loeb v. Mathis, 37 Ind. 306; McChesney v. Hager, 104 S. W. 714, 31 Ky. Law Rep. 1038; Stout v. Board Com'rs of Grant County, 107 Ind. 343, 8 N. E. 222.

the enactment of a new measure in different terms. Hence if the decision of the court gains publicity, is brought to the notice of the legislators, and remains unchallenged, and one or more sessions pass by, or perhaps a long term of years, without any manifest disposition on the part of the law-making body to contradict it in the way mentioned, there is a very strong presumption that the interpretation put upon the statute by the court correctly divined the true meaning of the law and should not be reversed. So also, if, continuously after the promulgation of the decision, many suits are brought in the courts by parties particularly affected by the statute, and involving the same question of construction, with repeated attempts to obtain a different ruling, it shows that the people have not accepted the decision as correct and have not shaped their acts and dealings in accordance with it, and therefore that it has not become a rule of property, and may be overruled without danger of any great mischief resulting, while the absence of any such endeavors to procure a reversal of the decision (in other words, a general acquiescence in it) would raise an exactly contrary presumption.

But this rule has its important restrictions and limitations. Thus, the doctrine of stare decisis cannot be invoked in favor of decisions on former statutes which were merely similar to, but not identical with, the one under review.[36] Nor will the rule of following former decisions apply unless the question of the interpretation or construction of the statute was directly involved in and necessarily determined by the former adjudication.[37] And further, the case at bar must be identical with, or at least parallel to, the former case in all its essential features, with no substantial differences to distinguish the one from the other; in other words, the same question must be presented, upon the construction of the same statute or the same clause or provision of it, as applied to a state of facts essentially the

[36] Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200, 60 L. R. A. 33. But see State v. Behan, 113 La. 754, 37 South. 714.

[37] St. Louis, O. H. & C. Ry. Co. v. Fowler, 142 Mo. 670, 44 S. W. 771.

same.[38] And generally this doctrine applies only to judicial interpretations of statutes settled by the deliberate judgments of the court of last resort in the state, although it may extend to the like solemn adjudications of the court of final resort in some other state, if the statute in question was copied and adopted from the legislation of that state.[39] And occasionally the rule has been so far extended as to include adjudications of minor authority. Thus, in Mississippi, it is said that when the true meaning of a statute is doubtful, a construction which has been adopted by the inferior courts for a long period of time, and under which important rights have accrued, will not be disturbed by the supreme court of the state.[40] And in Kentucky, in a similar case of doubt, a legislative exposition of the statute, together with an extrajudicial dictum of the supreme court formerly made, were allowed to have a decisive influence.[41]

RE-ENACTED STATUTES

75. A statute literally or substantially re-enacting a prior statute after its words have received a judicial interpretation must be regarded as adopted with knowledge of such construction and with the intention that it should thereafter be interpreted in the same way. Therefore the prior decisions, in which the construction of the statute was settled, are binding precedents for its interpretation after the re-enactment.

It is a familiar and very well settled rule of statutory construction that, where a statute has received a settled interpretation at the hands of the courts, and it is afterwards re-enacted by the same legislative power, in the same terms, or in substantially the same language, for the same purpose

[38] See Wood v. Mayor, etc., of City of New York, 73 N. Y. 556.

[39] See McManus v. Lynch, 28 App. D. C. 381. And see infra, chapter X.

[40] Plummer v. Plummer, 37 Miss. 185.

[41] Commonwealth v. Miller, 5 Dana (Ky.) 320.

and object, it will be presumed that the Legislature was aware of the decisions of the courts upon the meaning of the statute and was satisfied therewith, and intended that the re-enacted law should bear the same interpretation which was given to its original, and it will be construed accordingly, unless a contrary intention is very clearly shown.[42] From this rule it follows necessarily, as a proposition germane to our present purpose, that the prior judicial decisions in which the interpretation of the statute was settled are not merely persuasive evidence of the meaning and application of its terms, but they are absolutely conclusive thereof, and that they must be followed, wherever applicable, in the construction of the statute as re-enacted. For the Legislature by adopting the statute anew in the light of such decisions, and by tacitly approving and adopting them, as shown by its refraining from any verbal changes in the law, has in effect incorporated them into the statute and enacted them as law; so that, in addition to their ordinary force as judicial precedents, they are now fortified by the legislative sanction and adoption, and therefore are not on any account to be departed from. Thus, to illustrate the rule by a single example, the federal bankruptcy act of 1841 contained a provision that a discharge in bankruptcy should not release debts which had been contracted by the bankrupt in a "fiduciary capacity." The same provision was repeated in the bankruptcy act of 1867, and again in that of 1898, and it was held that these words were intended by Congress to bear, and should be construed by the courts to bear, the same meaning which had been given to them by the judicial interpretations under the earlier law; so that the decisions upon the meaning of this phrase, as used in the act of 1841, are not only pertinent, but are authoritative, precedents for its interpretation under the later and present statutes.[43]

[42] Black, Interpretation of Laws (2d Ed.) p. 607, and many cases there cited.

[43] Woolsey v. Cade, 54 Ala. 378, 25 Am. Rep. 711.

CHAPTER V

RULES OF PROPERTY

76. Definition.
77. Requisites of Decision Constituting Rule of Property and Scope of Rule.
78. Actual or Presumptive Reliance on Rule.
79. Judicial Adherence to Rules of Property.
80. When Rules of Property may be Reversed.

DEFINITION

76. A rule of property is a general principle of law established by a judicial decision or series of decisions, relating to the acquisition or devolution of title to real or personal property, or the nature, incidents, or extent of such title, or the incumbrance thereof, which has been relied on by the people as a part of the law governing their transactions, and the reversal of which would destroy or impair existing titles or rights.

Titles to Lands

The doctrine which requires a peculiarly strict adherence to judicial precedents in the case of decisions which constitute a rule of property is said to be especially appropriate and important, though not exclusively so, to decisions affecting the title to real estate, either in the way of laying down the principles essential to a good title, or declaring the particular objections which will be held fatal to an asserted title,[1] or defining the nature and extent of titles founded or ac-

[1] Minnesota Min. Co. v. National Min. Co., 3 Wall. 332, 18 L. Ed. 42; Asher v. Bennett, 143 Ky. 361, 136 S. W. 879; Gauthreaux v. Theriot, 121 La. 871, 46 South. 892, 126 Am. St. Rep. 328. The importance of this rule and the reasons on which it rests are well illustrated by an early case in Massachusetts, although the decision was based upon a long-continued usage rather than upon a judicial precedent. The question involved was as to the interpretation of certain colonial laws of that state, giving to freemen the power to "dispose of" their lands. The court said: "Of these statutes a practical construction early and generally obtained that in the

quired in a particular way. For example, a judicial decision that the owner of property situate on the banks of a navigable stream running through the state, or constituting one of its boundaries, owns also the bed of the river to the middle of the stream, as at common law, establishes a rule of property, especially when followed and approved for a number of years, and should not be changed, whatever views may be entertained of its original correctness.[2] The same is true of decisions settling the relative rights of a municipal corporation and the abutting land owners in the street or highway, as, for instance, that the abutting owner remains seised of the fee in the street or road, subject only to the public easement of passage.[3] Again, decisions settling the

power to dispose of lands was included a power to sell and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. And although, if it were now res integra, it might be very difficult to maintain such a construction, yet at this day the argumentum ab inconvenienti applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words." Rogers v. Goodwin, 2 Mass. 475.

[2] June v. Purcell, 36 Ohio St. 396. Of course a decision contrary to that stated in the text equally becomes a "rule of property" in the state where made, in such sense that it cannot afterwards be changed except for the most cogent reasons. Thus, in Missouri it has been decided that a proprietor of land on the bank of the Missouri river does not own to the center of the stream, but only to the water's edge, and this is held to be a rule of property. Rees v. McDaniel, 115 Mo. 145, 21 S. W. 913. So, the construction of the words "middle of the Mississippi river" to mean a line equidistant from the visible, defined, and substantially established banks confining its waters, and not the middle of the channel of commerce, has become, in Tennessee, a rule of property which will not be disturbed. State v. Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437.

[3] Mott v. Clayton, 9 App. Div. 181, 41 N. Y. Supp. 87; Thorndike v. Milwaukee Auditorium Co., 143 Wis. 1, 126 N. W. 881.

rights of married persons and their creditors in the community property (where that system prevails) "constitute rules of property from which no departure can be sanctioned."[4] The same principle was applied by the Supreme Court of Oregon in a case involving the construction of a statute of that state which provides that the party in whose favor a decree of divorce is granted shall be entitled to one third of the real estate of the other party, and that it shall be the duty of the court in all such cases to enter a decree in accordance with this provision. The court had formerly held, in a series of decisions, that where the complaint contained no allegations concerning property, and the decree was silent on the subject, the successful party in an action of divorce did not acquire either a legal or an equitable right to any property of the adverse party by force of the decree. And it was held that these decisions, having stood unquestioned for many years, had become a rule of property and should not be disturbed.[5] In further illustration of the same principle, it has been declared in Wisconsin that a decision of the court of last resort, relating to the exemption of land from taxation, made more than twenty years before and recently affirmed by the same court, is a rule of property which cannot be departed from.[6]

Execution and Recording of Conveyances

Since the validity of titles to land frequently depends on the legal sufficiency of the instruments by which such property is conveyed and incumbered, decisions settling the principles by which the form and effect of deeds and mortgages are to be tested, and the requisites of their execution and acknowledgment, as also the effect of recording or failing to record them, become in the strictest sense rules of property. "Where a decision relates to the validity of certain modes of doing business, which business enters largely into the daily transactions of the people of a state, and a

[4] Dickson v. Dickson, 36 La. Ann. 453.

[5] Ross v. Ross, 21 Or. 9, 26 Pac. 1007, overruling Weiss v. Bethel, 8 Or. 522.

[6] Mariner v. Oconto Land Co., 142 Wis. 531, 126 N. W. 34.

change of decision must necessarily invalidate everything done in the mode prescribed by the first, there, where a decision has once been made and acted on for any considerable length of time, the maxim [stare decisis] becomes imperative and no court is at liberty to change. Take a case involving the validity of certain modes of executing deeds. A decision is made and the people act upon it for years, executing all such instruments in the manner prescribed. After that, some one raises the question again, and contends that the first decision is erroneous. Admit it to have been so; would the court be justified in overruling it? Every man, whether lawyer or layman, would answer, no." [7] So also, as to the recording of such instruments. A judicial rule, based upon a construction of the statute, that an unrecorded deed will not prevail against a subsequent deed taken in good faith and for a valuable consideration, is a rule of property and will not be reconsidered.[8] And so of a decision that an unrecorded mortgage has no validity either in law or equity as against the lien of a judgment.[9]

Judicial Sales

Decisions relating to the manner and sufficiency of sales on judicial process, the criteria by which their validity is to be tested, and the nature and stability of the title acquired by the purchaser, affect vitally the transfer of both real and personal property, and should not be disturbed or changed if they have, for a considerable period of time, been relied on by interested parties and approved by the courts.[10] Thus, where a particular manner of issuing attachments or other process has been for many years sanctioned by the courts, and the title to real and personal property has for many years passed under judicial sales based on such attachments, the court of last resort in the state

[7] Kneeland v. City of Milwaukee, 15 Wis. 454, 602, per Paine, J., dissenting.

[8] Clark v. Troy, 20 Cal. 219.

[9] White v. Denman, 1 Ohio St. 110.

[10] Garth v. Arnold, 115 Fed. 468, 53 C. C. A. 200; Townsend v. Martin, 55 Ark. 192, 17 S. W. 875.

will regard the practice thus followed as the proper one, and the question as settled.[11]

Condemnation Proceedings

For similar reasons, the decisions of the courts should be regarded as establishing rules of property when they have settled the essential elements of a proceeding for the condemnation of land under the power of eminent domain, at least, those features on which the fundamental rights of the parties may depend or the title acquired; as, for instance, where it is decided that the condemnation of land for the purposes of a canal transfers to the appropriating company an estate in fee and not a mere easement.[12] But it may be otherwise as to matters not affecting the ultimate rights of the parties or the validity of the title, such as the question of withholding the compensation to be paid pending an appeal.[13]

Dedication of Lands

Decisions settling the validity of a dedication of land to a municipal corporation and adjudicating upon the extent and incidents of its title acquired thereby—as, that the city is not bound by a designation of the uses for which the property was intended by the original proprietors, that it has the right to make any disposition of it authorized by its charter, and that portions of the tract, when not needed for public use, may be leased to individuals for private purposes—constitute a rule of property, which will be followed and adhered to in all subsequent litigation affecting the dedicated land or parts of it, especially when acquiesced in for a long term of years, whatever may be thought of their original correctness.[14]

[11] Northern Bank of Kentucky v. Hunt's Heirs, 93 Ky. 67, 19 S. W. 3.

[12] Frank v. Evansville & I. R. Co., 111 Ind. 132, 12 N. E. 105.

[13] See St. Louis, K. & N. W. R. Co. v. Clark, 119 Mo. 357, 24 S. W. 157.

[14] Union R. Co. v. Chickasaw Cooperage Co., 116 Tenn. 594, 95 S. W. 171; Wilkins v. Chicago, St. L. & N. O. R. Co., 110 Tenn. 442, 75 S. W. 1026.

Investments, Contracts, and Securities

Whenever judicial decisions construing a statute, or laying down the principles of the common law, have come to be recognized by the people as furnishing the rule by which the validity of their contracts, obligations, and business enterprises generally will be tested, and on which they are to rely for the enforcement of their rights or the protection of their interests, such decisions constitute a rule of property; and even though they may afterwards be thought to be incorrect, they will not ordinarily be overruled. Thus, where a line of decisions, or even a single decision, has been regarded as definitely settling a point in the law relating to the acquisition or incumbrance of real property, and on the faith of it the people have invested their money in land, the question will not be considered open to further controversy, and the former decision or decisions will be adhered to without regard to their original soundness.[15] On this principle, a decision of the court of last resort sustaining the validity of deeds of trust, used as substitutes for the common-law form of mortgage, to secure loans of money on real property, will establish a rule of property which should not afterwards be disturbed.[16] And so also as to a ruling upon the rights and titles acquired under a foreclosure of a statutory or corporate mortgage.[17] And where the courts have once solemnly pronounced in favor of the validity of an issue of bonds by a municipal corporation, and the people have relied on the decision as precluding any further dispute on the point and have accordingly invested their money in such securities, a rule of property is established, and the bonds cannot be invalidated by subsequent judicial decisions of a contrary tenor.[18] This principle has also been broadly extended to cover all decisions of the courts

[15] Harrow v. Myers, 29 Ind. 469; State ex rel. Dobbins v. Sutterfield, 54 Mo. 391.

[16] Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813.

[17] Wilson v. Beckwith, 140 Mo. 359, 41 S. W. 985.

[18] Mitchell v. Burlington, 4 Wall. 270, 18 L. Ed. 350; Joyce v. Newmark & Edwards, 7 Cal. App. 176, 93 Pac. 1041; Smith v. Ferries & C. H. Ry. Co. (Cal.) 51 Pac. 710; Irving Real Estate Co. v. City of Portland (Or.) 107 Pac. 955.

which have been practically regarded as establishing a definite basis for the formation of contracts and for business transactions of all kinds and the ordinary forms of commercial dealings.[19]

Law of Wills and Descent

It is very fully settled that judgments of the higher courts deciding questions which arise concerning the descent and distribution of property, whether by will or under the laws of intestate succession, establish rules of property which cannot afterwards be departed from, however much judicial opinion may have changed in the meanwhile. This is said to be particularly true where titles to real property have vested and have been held in accordance with and in reliance on such decisions. The cases cited below will show the application of this rule to such questions as the right of a surviving husband or wife as against nephews or nieces in default of nearer kin, the estate taken by a childless second wife as against surviving issue of the former marriage, the law in regard to vested and contingent remainders, the lapsing of legacies as between devisees dying before and after the making of the will, estates by the curtesy, and allowances in lieu of homestead.[20] As to the importance

[19] **Parke v. Boulware, 9 Idaho, 225, 73 Pac. 19; Rothschild v. Grix, 31 Mich. 150, 18 Am. Rep. 171; Kneeland v. City of Milwaukee, 15 Wis. 454, 692. As to guaranties, see Lieber, Hermeneutics, 315, Hammond's note, where it is said: "If the courts decide a certain form of guaranty to be good, it is evident that men will hereafter use that form and rely upon it, and no court can subsequently declare it bad without the risk of great mischief, by making worthless existing contracts and obligations. But if the former decision had been that it was bad, the only practice that could be founded on such a decision would be a practice of abstaining entirely from the use of such a form; and a subsequent decision, reversing the former, and holding the form to be good, would do little if any harm."**

[20] **Brown v. Finley, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68; In re Nigro's Estate, 149 Cal. 702, 87 Pac. 384; Thompson v. Henry, 153 Ind. 56, 54 N. E. 109; Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Bunting v. Speek, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690; Fisher v. Lott, 110 S. W. 822, 33 Ky. Law Rep. 609; Shumaker v. Pearson, 67**

of stability in the application of the rule, we quote the following from the Supreme Court of Indiana: "Our canon of descents is not remarkable for precision and clearness, and vexatious questions are often occurring, requiring judicial interpretations of the statute. We cannot change a decision without producing confusion in titles, as the ruling made would necessarily relate back to the time the law came into force. But if the canon of descent, as determined by the court of last resort, is unjust or even distasteful, the legislature can change the rule by a new statute without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion in questions of property by overruling the previous decisions of this court." [21]

Title and Rights of Public Officers

A "rule of property" is not necessarily one relating to the title to real or personal estate. And it has been held that a judicial decision that ballots cast at public elections must bear the full name of the candidate voted for, not merely his initials, concerns the title of public officers to their offices, and will not be departed from, after the lapse of a term of years, merely because deemed wrong in principle.[22] But on the other hand, public office is certainly not a contract, and an officer takes his office subject to any regulations which may subsequently be made concerning it. Hence where a statute fixing or reducing the rate of his compensation is adjudged unconstitutional, but the decision is afterwards overruled and the law held valid, he cannot contend that the first decision constituted a rule of property or a contract.[23]

Ohio St. 330, 65 N. E. 1005; Runyan v. Winstock, 55 Or. 202, 104 Pac. 417; Bright v. Esterly, 199 Pa. 88, 48 Atl. 810; Mayman v. Reviere, 47 Tex. 357.

[21] Rockhill v. Nelson, 24 Ind. 422.

[22] People ex rel. Gurdon v. Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[23] Sudbury v. Board of Com'rs of Monroe County, 157 Ind. 446, 62 N. E. 45.

Statutory Construction

The principle under consideration applies as well to the construction of statutes as to decisions enunciating the rules of the common law. After the intent and meaning of a statute have been settled by judicial construction, the interpretation put upon it becomes as much a part of the law as the text itself, so far as regards titles and contractual rights acquired under it. And in so far as such a construction establishes a rule of property, it will not be altered, to the prejudice of titles and rights settled and adjusted under it, so long as the statute itself remains unchanged, unless some paramount and constraining reason for a change of judicial rulings shall be made to appear.[24]

Precedents Not Settling Rules of Property

It should be observed that, while a judicious adherence to precedents is important in all cases, for the purpose of imparting stability and certainty to the law, and while the rule of stare decisis applies with special and peculiar force in the case of rules of property, yet this force is much moderated when the question is as to the continued enforcement of a judicial rule which cannot be made the basis of titles, contracts, or other vested rights. In the latter case, the former adjudications should be followed unless plainly erroneous. But in the case of a rule of property, they should be followed even though they are plainly erroneous. "The maxim 'stare decisis' has greater or less force according to the nature of the question decided. There are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability in the law. These are questions where the decision did not constitute a business rule, and where a change would invalidate no business transactions conducted upon the faith of the first adjudication. As an illustration, take a case involving personal liberty. A party restrained of his liberty claims to be dis-

[24] Levy v. Hitsche, 40 La. Ann. 500, 4 South. 472; City of Sedalia v. Gold, 91 Mo. App. 32; Day v. Munson, 14 Ohio St. 488; Brown v. Farran, 3 Ohio, 140.

charged under some constitutional provision. The court erroneously decides against him. The same question arises again. To change such a decision would destroy no rights acquired in the past. It would only give better protection in the future. The maxim in such a case would be entitled to but very little weight, and mere regard for stability ought not to be allowed to prevent a more perfect administration of justice." [25]

It is not always easy to draw the line of distinction between precedents which do, and those which do not, establish rules of property. But in general it may be said that decisions in regard to remedies and matters of procedure and practice may become rules of property if they so far affect the substantial rights of parties that a change in the rule would impair vested rights—rights, that is, of property, as distinguished from a mere right to avail oneself of a particular remedy or method of procedure.[26] Thus, the right of a vendor of real estate, in an action for breach of the covenants of a warranty deed against incumbrances, to prove a parol agreement by the vendee to pay the taxes which are a lien on the land, as a part of the consideration of the conveyance, was said, at an early day, to have become a rule of property in Indiana.[27] So again, where a defendant in partition, after final decree therein, acquired an outstanding interest from an owner who had not been a party, and at the time he acquired such interest was entitled, under a decision of the supreme court, to set it up against the plaintiff in the partition proceedings, his right to do so will not be affected by a subsequent contrary decision of the supreme court.[28] But a decision that an ordinary foreclosure suit in a court of equity may be maintained by a county to enforce a lien for delinquent taxes, without the prior issuance of a tax sale certificate, is a rule of practice and not

[25] Kneeland v. City of Milwaukee, 15 Wis. 454, 692, per Paine, J., dissenting.

[26] See Thouvenin v. Rodrigues, 24 Tex. 468; Reid v. Wayne Circuit Judge, 132 Mich. 406, 93 N. W. 914.

[27] Carver v. Louthain, 38 Ind. 530.

[28] Hill v. Brown, 144 N. C. 117, 56 S. E. 693.

a rule of property.[29] And a construction placed upon a section of the constitution prescribing the mode of amending laws, is not a rule of property, but only a rule of legislation.[30] And the principle of stare decisis does not apply to a decision which settled a mere rule of evidence, such as the measure of credibility to be accorded to the testimony of a witness shown to have been false in one particular. "It is not a rule of property that is involved, but a rule affecting the practical administration of justice, and which, if wrong, ought at the earliest opportunity to be corrected." [31]

REQUISITES OF DECISION CONSTITUTING RULE OF PROPERTY AND SCOPE OF RULE

77. In order that a judicial precedent should be recognized as having settled an inviolable rule of property, it must have proceeded from the court of last resort; and in the case of a series of decisions, it is necessary that they should be uniform and free from conflict. Further, the scope of a rule so established will be limited to the precise questions involved in the prior decision and adjudicated by it, or to such points or principles as may be necessarily implied in the judgment given.

No such finality attaches to the decisions of the inferior or intermediate courts that they can be considered as establishing a rule of property, however uniform their course of decisions or however long continued. No question of law is finally settled until it has been determined by the court of last resort. It is of the essence of the theory of "rules of property" that the members of the community have (or may be supposed to have) taken titles, invested

[29] Logan County v. Carnahan, 66 Neb. 685, 95 N. W. 812.
[30] Greencastle Southern Turnpike Co. v. State ex rel. Malot, 28 Ind. 382.
[31] Mead v. McGraw, 19 Ohio St. 55.

money, and regulated their business dealings in reliance on a judicial decision or decisions which they had a right to regard as a final and authoritative statement of the law which should govern them. If such action has been taken by interested parties on the faith of a decision of a lower court merely, this should not in any way bind or preclude the highest court, when the question is presented to it, from announcing a contrary rule, if that is deemed more correct.[32] It is true that an appellate court might hesitate long before reversing a rule long and consistently adhered to by the inferior courts, if thoroughly satisfied that interests of great importance and wide extent have vested under the supposed rule and that great injury would result from overturning it. But even in this case the upper court would not feel judicially constrained to yield its views to those asserted below on the technical ground of a rule of property being involved. As between the various inferior courts of the same system, having co-ordinate jurisdiction, a uniform course of decisions in the other courts might well induce any one of them to accept and follow the ruling so made, in the absence of any decision of the court of last resort. But even if such a course could be based on the ground that the current of authorities had established a rule of property, there is no room for such a contention where the decisions of the various co-ordinate courts on the point in question are not uniform but conflicting.[33] And indeed, this applies also to a series or line of decisions in the highest court of the system. They cannot be regarded as establishing a rule of property unless they are uniformly to the same effect and purport.

In order to constitute a rule of property, it is not necessary that reiterated decisions should have been rendered on the same question. Although the original adjudication upon the point involved will gain force and authority from having been followed and approved in numerous subse-

[32] Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 South. 937; Ocean Beach Ass'n v. Brinley, 34 N. J. Eq. 438. Compare Jefferson v. Bangs, 197 N. Y. 35, 90 N. E. 109, 134 Am. St. Rep. 856.

[33] The Madrid (C. C.) 40 Fed. 677.

quent cases, still a single well-considered decision upon the precise point may be regarded as establishing a rule of property, so that it will not be overruled though deemed erroneous, if valuable rights and interests have become vested under it.[34] Furthermore, a single decision may become a rule of property as to a particular parcel or kind of property; as, where it settles the title to a great tract of land, which is afterwards divided into many parcels which pass into the hands of as many different subsequent holders.[35] And in a case such as this the decision may retain its authority as laying down the rule for particular property, although, as to the general rule of law involved, it may have been afterwards disapproved or repudiated. Thus, where a defendant bought land on the faith of a decision establishing the title thereto, paying full value, the court will adhere to that decision as a rule of property for that particular land, in a subsequent action involving the title, although the plaintiff may not be concluded by the previous decision as res judicata, and although the decision itself has been overruled.[36]

A judicial decision cannot be taken as establishing a rule of property wider than the issues involved and determined in the case. In other words, its irreversible authority in matters of this kind extends only to the precise question of law involved in the particular case and necessarily considered and determined by the court in disposing of the case before it.[37] Some of the authorities, however, recognize an extension of this principle to cases where a statute or ordinance has been repeatedly recognized and enforced as a valid law by the judgments of the supreme court, although its constitutionality has never been directly litigated. In these circumstances, if property interests have been based on the decisions construing the law, and business

[34] Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351.
[35] Hihn v. Courtis, 31 Cal. 402.
[36] Bibb v. Bibb, 79 Ala. 437.
[37] Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 South. 937; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450.

has conformed to the law as existing and enforced, it will be assumed that the court of last resort, by directing the enforcement of the law as interpreted by it, has impliedly recognized its validity, and its constitutionality is no longer a subject of controversy.[38] There is also a difference in this particular between a single isolated decision and one which has been followed in numerous subsequent cases. In the former case, the rule of property established by the decision is to be limited, as above stated, to the precise point necessarily involved and decided. But in the latter case, the rule must be as extensive as the boundaries marked out for it by the subsequent decisions. That is, the original decision will be authority and a rule of property as to all the principles declared by the subsequent cases to have been established by it.[39] And in this way a mere dictum, when it relates to such matters as the validity of titles to real estate, may acquire the sanctity and inviolability of a rule of property, if it is accepted by subsequent decisions of the same court, not as a dictum but as an official precedent.

It remains to be stated that rules of property established by the decisions of the court of last resort of a state are carried over into a new state, which is formed out of the territory of the first state, and remain there equally binding and conclusive. For instance, where a decision of the Court of Appeals of Virginia has been rendered, establishing a rule of property, which has been repeatedly followed in like cases, before the creation of West Virginia, it will not be disturbed or departed from by the courts of West Virginia, except for the most cogent reasons and upon a clear manifestation of error.[40]

[38] United States Saving & Loan Co. v. Miller (Tenn. Ch. App.) 47 S. W. 17; Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30; Dunklin County v. Chouteau, 120 Mo. 577, 25 S. W. 553. Compare Saffell v. Orr, 109 Va. 768, 64 S. E. 1057.

[39] Matheson's Heirs v. Hearin, 29 Ala. 210, 218.

[40] Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302.

ACTUAL OR PRESUMPTIVE RELIANCE ON RULE

78. To constitute a decision or series of decisions a rule of property it is not necessary to show actual instances of reliance placed upon them by the people as settling the law. It is enough if the rule announced was capable, from its general nature, of becoming a rule of property, and if, from the nature and frequent occurrence of the kind of transactions to which it relates, it may reasonably be presumed to have entered into the business dealings of the community; and this presumption increases in force with the length of time the rule has stood.

On the question of following or overruling a previous decision or series of decisions, the existence and effect of the rule therein announced as a rule of property is matter of fact, rather than matter of law. But it is not to be determined by the production of evidence, but by the weighing of presumptions. It is neither necessary nor proper to bring to the attention of the court specific instances, outside the record, in which titles may have vested or rights may have been acquired in reliance on the stability of the previous decision. It is to be shown, by an analysis of the decision in question and of the rule which it laid down, in relation to the general business habits of the community, the practice of conveyancers, and the well-known facts of past or contemporary history, as bearing on the question, first, that the particular rule or principle enunciated was naturally capable of entering into the foundation of titles or other rights as a determining element, and second, that the kind of transactions to which it relates are of frequent, general, or usual occurrence. To these facts will be added the presumption that the people generally will accept and rely on a decision of the court of last resort as settling the law on the particular point to which it relates. Of course it is possible to conceive of instances in which a decision of the highest court of the state might be generally

regarded by experts as a dangerous precedent, as a very serious innovation, or as being radically unsound and indefensible. This would detract greatly from its authority, and in such cases lawyers would advise their clients to safeguard their interests by avoiding the particular state of facts or combination of circumstances to which the decision related, or by so arranging their transactions that they would not be affected by either the sustaining or the overruling of the doubtful decision. In these circumstances, it could scarcely become a rule of property. But cases of this kind must be so rare as to be negligible in a practical consideration of the general rule. Ordinarily, therefore, the concurrence of these three elements—the nature of the rule announced in the previous decision, as being capable of applying to the acquisition, descent, or transfer of property or rights, the frequent or usual occurrence of the acts or transactions to which it relates, and the usual acquiescence in the decisions of the court of last resort as settling the law—will be sufficient to show that it has become a rule of property and is so regarded. In the language of the authorities, the special reasons which forbid the overruling of a decision of this kind apply where it "may fairly be presumed to have been acted on as a rule of property," where it "may reasonably be supposed to have entered into the business transactions of the country," where "investments and contracts have presumably been made" on the faith of it, or where it "may" or "probably has" been regarded as a rule of property.[41]

Acquiescence in a decision and reliance upon it as a rule of property may further be shown by the absence or rare occurrence of litigation involving the same question or point of law. Thus, Lord Mansfield once remarked: "The great object in questions of property is certainty, and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it than if

[41] Bennett v. Bennett, 34 Ala. 53; Matheson's Heirs v. Hearin, 29 Ala. 210; McVay's Adm'r v. Ijams, 27 Ala. 238; Schoonover v. Birnbaum, 148 Cal. 548, 83 Pac. 999; Dean v. Gibson (Tex. Civ. App.) 48 S. W. 57.

it were to be overturned. Many estates may be enjoyed under the authority of Coulson v. Coulson ([2 Atk. 246, 247, 250, 2 Strange, 1125] the case now impugned and sought to be overturned) the titles to which would be shaken if the decision in that case were to be overruled, and the case is so generally known among conveyancers that it is impossible there should be many held under the contrary construction, because if there were they would have been controverted." [42]

Unquestionably there may be cases in which it can be affirmed without hesitation that a given decision has become a rule of property, as, for example, where the decision sustained the constitutional validity of a statute authorizing a city to issue bonds for the construction of a public improvement, and on the faith of it the bonds have been sold and the improvement made.[43] On the other hand, there are occasional cases in which it can be plainly seen that a given decision could not or did not become a rule of property. For instance, a decision that a statutory grant of exemption from taxation to a certain institution did not extend to certain classes of property may be overruled without regard to the doctrine of rules of property, where it appears that no other institution in the state enjoys a grant of exemption in the same terms in its charter or by general law.[44] Even in cases where there can be no certainty as to whether the particular decision has or has not been relied on as a rule of property, yet if it is not probable that many titles may have been acquired on the strength of it, and vast interests depend on the correct solution of the question of law involved, it may properly be considered open to reconsideration.[45] In fact, as we have stated above, it is altogether a question of probability, the presumption being more or less strong according to several

[42] Hodgson v. Ambrose, Doug. 337.

[43] City of Cincinnati v. Taft, 63 Ohio St. 141, 58 N. E. 63.

[44] Colorado Seminary v. Board of Com'rs of Arapahoe County, 30 Colo. 507, 71 Pac. 410. And see Becker v. Superior Court of Santa Clara County, 151 Cal. 313, 90 Pac. 689.

[45] Wilson v. Beckwith, 140 Mo. 359, 41 S. W. 985.

varying circumstances. As remarked by a writer on this subject: "Although the authorities are silent on the degree of presumption requisite to overbear an actual case of hardship before the court, I apprehend it would require a very striking case of present positive hardship, amounting to an irremediable injustice, to overcome even the ordinary presumption that a decision of some length of time standing, capable of becoming a rule of property, has actually done so." [46]

The length of time during which the particular decision has stood unquestioned (or at any rate not overruled) has an important bearing on this question. For of course, as the years go by, the number of instances in which it has been relied on as a rule or foundation for the acquisition and transfer of property will increase, and proportionally greater would be the injury and confusion resulting from overturning it. If the decision was wrong in principle and is likely to do great harm, it may be arrested and corrected while it is still a novelty. As stated by the court in Missouri, a decision should not be adhered to on the ground of stare decisis, where it is not supported by reason or authority, and is in conflict with prior decisions, and is of so recent promulgation that it is not probable that property rights will be seriously affected by its reversal.[47] But it

[46] Wells, Res Adjud. p. 552.

[47] Young v. Downey, 150 Mo. 317, 51 S. W. 751. See, also, Herron v. Whiteley Malleable Castings Co. (Ind. App.) 92 N. E. 555. In the latter case, it was held that the rule of adherence to precedents which constitute a rule of property or contract does not apply where the decisions relied on are conflicting, not well considered, or made so recently before the contract or property right to be affected was made or acquired that they could not reasonably be presumed to have been made or acquired on the faith of the decisions relied on. In the case at bar, the question was as to the lien of one furnishing machinery to an insolvent corporation, but without filing notice of intention to claim a materialman's lien. The decision relied on had been made only three or four months before the sale, and was in conflict with other recent decisions of the same court. It was held that it could not be considered as having established a rule of property, so far as concerned the plaintiff in this case. Herein it was also stated that decisions of the courts of last resort do not

is otherwise if a considerable period of time has elapsed. It may then be too late to correct the erroneous decision without producing greater mischief than would ensue from letting it stand. In the nature of things it is impossible to name any precise period of time which would be requisite or sufficient thus to sanctify a wrong decision. That must depend upon the nature of the rule laid down and the comparative frequency or rarity of occurrence of the particular facts to which it relates. But if it concerns the transfer or descent of property or such other transactions as enter into the every-day life of the people, it appears that the lapse of a few years will protect it from subsequent review and reversal.[48]

JUDICIAL ADHERENCE TO RULES OF PROPERTY

79. A decision or series of decisions constituting a rule of property will not be overruled merely because the court is now convinced that they were erroneous or wrong in principle. Notwithstanding such conviction, the rule will be adhered to and followed unless there are reasons of overwhelming importance for reversing it.

In addition to the ordinary reasons for following and adhering to prior decisions, there are special grounds for refusing to overturn previous adjudications which have become rules of property. To justify a court in taking this action it is not enough to show that the earlier decision was wrong. Although the court, upon a recurrence of the same question, may be entirely convinced that the first decision was erroneous, unsupported by authority or legal

require the application of the rule of stare decisis until they have been published in the reports provided by law for their publication, or are of such long and unchallenged standing that they may reasonably be presumed to have become publicly known.

[48] Bennett v. Bennett, 34 Ala. 53 (six years); Schori v. Stephens, 62 Ind. 441 (ten years.)

reason, or fundamentally wrong in principle, yet if it has become a rule of property, this will not warrant its reversal; in addition, there must be very cogent, and indeed imperative, reasons, growing out of the practical operation of the rule in question or out of the requirements of sound public policy, for changing the law.[49]

This rule, and the reasons on which it rests, are amply vindicated by the authorities. "There are some questions in law the final settlement of which is vastly more important than how they are settled, and among these are rules of property, long recognized and acted upon, and under which rights have vested. However much the court, as now constituted, may differ from the decisions of its predecessors upon such questions, it will not overrule

[49] Bennett v. Bennett, 34 Ala. 53; Field's Heirs v. Goldsby, 28 Ala. 218, 65 Am. Dec. 341; Pitcock v. State, 91 Ark. 527, 121 S. W. 742; Hihn v. Courtis, 31 Cal. 398; Scott v. Stewart, 84 Ga. 772, 11 S. E. 897; Braxon v. Bressler, 64 Ill. 488; Reichert v. McClure, 23 Ill. 516; Hopkins v. McCann, 19 Ill. 113; Harrow v. Myers, 29 Ind. 470; Rockhill v. Nelson, 24 Ind. 422; Pond v. Irwin, 113 Ind. 243, 15 N. E. 272; Lindsay v. Lindsay, 47 Ind. 283; Hines v. Driver, 89 Ind. 359; Wiseman v. Beckwith, 90 Ind. 185; Rocker v. Metzger, 171 Ind. 364, 86 N. E. 403; Nickels v. Commonwealth, 131 Ky. 75, 64 S. W. 448, 23 Ky. Law Rep. 778; Farmer's Heirs v. Fletcher, 11 La. Ann. 142; Fisher v. Wagner, 109 Md. 243, 71 Atl. 999, 21 L. R. A. (N. S.) 121; Emerson v. Atwater, 7 Mich. 12; Curriden v. St. Paul & N. P. Ry. Co., 50 Minn. 454, 52 N. W. 966; Boon v. Bowers, 30 Miss. 246, 64 Am. Dec. 159; Lombard v. Lombard, 57 Miss. 171; Reed v. Ownby, 44 Mo. 204; St. Louis Ry. Co. v. Southern Ry. Co., 138 Mo. 591, 39 S. W. 471; Nortnass v. Pioneer Townsite Co., 82 Neb. 382, 117 N. W. 951; Grandjean v. Beyl, 78 Neb. 354, 114 N. W. 414; State v. Taylor, 68 N. J. Law, 276, 53 Atl. 392; Van Winkle v. Constantine, 10 N. Y. 422; Goodell v. Jackson, 20 Johns. (N. Y.) 693, 722, 11 Am. Dec. 351; Kirby v. Boyette, 118 N. C. 244, 24 S. E. 18; Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; Sheldon's Lessee v. Newton, 3 Ohio St. 494; Kearny v. Buttles, 1 Ohio St. 362; Dugan v. Campbell, 1 Ohio, 115; Paulson v. City of Portland, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673; York's Appeal, 110 Pa. 69, 2 Atl. 65; Gage v. City of Charleston, 3 S. C. 491; State ex rel. Gaines v. Whitworth, 8 Lea (Tenn.) 594; Bonds-Foster Lumber Co. v. Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877; James v. James, 51 Wash. 60, 97 Pac. 1113; Pyles v. Riverside Furniture Co., 30 W. Va.

them."[50] To the same effect is the declaration of the Supreme Court of California that, when a rule by which the title to real property is to be determined has become established by positive law, or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of less importance than that it should itself be constant and invariable.[51] So also the court in New York affirms that "when a rule of property has been once deliberately adopted and declared, it ought not to be disturbed by the same court, except for very cogent reasons; otherwise the community would never be able to deal with safety, and would be in a state of perplexing uncertainty as to the law."[52] In an instructive case in Indiana we find the following language: "The question at the threshold is whether a rule of property thus repeatedly declared by the court of last resort, after earnest contest, and, it must be supposed, upon the most careful deliberation, should be deemed open to further controversy. The repose of titles is important to the public. Upon the faith of these decisions, our people have for a considerable period of years invested their money in real estate, the titles to which they were thus again and again assured were not liable to be disturbed. There must be a just basis of confidence in the stability of judicial decisions somewhere in the history of a controverted legal question, when it may

123, 2 S. E. 909; Brader v. Brader, 110 Wis. 423, 85 N. W. 681. Compare Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635. The rule as stated by the Indiana Court of Appeals is as follows: Where a principle of law doubtful in character or uncertain in the subject-matter of its application, or a construction of a statute couched in language the meaning of which is uncertain or obscure, has been settled by a decision of a court of last resort for such a length of time, and is of such a character as to have become an established rule of property or of contract, such rule or statutory construction will not be overthrown so as to affect the property or contractual rights acquired on the faith of the decision. Herron v. Whiteley Malleable Castings Co. (Ind. App.) 92 N. E. 555.

[50] Rockhill v. Nelson, 24 Ind. 422.

[51] Smith v. McDonald, 42 Cal. 484.

[52] Goodell v. Jackson, 20 Johns. (N. Y.) 693, 722, 11 Am. Dec. 351.

be confidently relied on that the question is settled. It is not always that the courts may freely inquire, in determining a case before them, what is the law. Sometimes investigation should stop when it is ascertained what has been decided on the subject. We think the doctrine of stare decisis should be applied to the question now presented. Such is its relation to the interests of our people, among whom real estate is so much an article of traffic, that it is not possible to estimate the extent of the evil which would follow a decision of this court now overruling Strong v. Clem [12 Ind. 37, 74 Am. Dec. 200] and the cases which followed it. If the doctrine of those cases be admitted to be wrong, yet it is quite obvious that it has already accomplished most of the harm that can ever result from it, while a change now would sow a wide crop of serious evils to the injury of those who are innocent, and who have purchased and sold real estate upon the faith of a doctrine declared by this court no less than half a dozen times within the last ten years." [53] So again, the Supreme Court of Ohio, speaking of the construction of a statute relating to suits on negotiable paper issued without authority by private bankers, remarks: "It is very evident that the simplest justice to our predecessors as well as the public should prevent us from interfering with decisions deliberately made, merely because a difference of opinion might exist between them and us upon a doubtful and difficult question of construction. But when, as in this case, the decision has relation to large amounts of a species of property which assumes a value in the market, changes hands, and is dealt with upon the confidence reposed in the correctness of the decision of the highest judicial tribunal in the state, nothing short of the most urgent necessity to prevent injustice, or vindicate clear and obvious principles of law, would justify us in departing from it." [54]

The final consideration which induces a court to adhere to what it believes to have been a bad or wrong decision is the inevitable injury to the rights of innocent parties who

[53] Harrow v. Myers, 29 Ind. 470.
[54] Kearny v. Buttles, 1 Ohio St. 362, 366.

have relied on it and regulated their conduct and their affairs with reference to it. If a court could merely declare that, without prejudice to past transactions, the rule should be thus and so for the future, this consideration would be eliminated. But it is not so. The necessary effect of overruling a previous decision is to declare that the law never was in accordance with the principles of that decision, and consequently that all rights or titles based on it are invalid. But what the courts cannot do the legislature can do; and therefore it is better to allow the error to be corrected by a new statute, which will save vested rights and operate upon future transactions only, than to change the law retrospectively. "We cannot change a decision," says the Supreme Court of Indiana, "without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determinations of the court of last resort, is unjust or even distasteful, the legislature can change the rule by a new statute without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion into questions of property by overruling the previous decisions of this court." [55]

WHEN RULES OF PROPERTY MAY BE REVERSED

80. Former decisions may be overruled, notwithstanding that they constitute a rule of property, when that course is necessary to correct a palpable error or prevent a continued injustice, and when it is evident that the loss or injury to individuals resulting from a reversal of the rule will be inconsiderable in comparison with the general benefits to be expected from establishing the law for the future on a correct and sound basis.

There is no principle of constitutional law which prevents the courts from overruling their previous decisions

[55] Rockhill v. Nelson, 24 Ind. 424.

when satisfied of their incorrectness. Though the decision in question may lie at the foundation of titles or other property rights, the constitutions, as now generally framed, do not lay any ban upon the courts in respect to the reconsideration and reversal of the rules they may have formerly laid down. The constitutional guaranties in respect to the enjoyment of property, the obligation of contracts, and the equal protection of the laws, are addressed to the legislative department of government, and perhaps in some instances, to executive or administrative officers, but not to the courts in a matter of this kind. Therefore judicial adherence to a rule of property once laid down is a matter of judicial propriety, based on consideration for vested rights and for the stability of the law, but not a constitutional right of the citizen.[56] On the contrary, the supreme law may require, instead of forbid, the reversal of earlier decisions. When a court is satisfied that a prior decision, though it may have become a rule of property, is directly in contravention of the constitution, it is its imperative duty to overrule it.[57] Aside from this, there are instances where it is not only permissible but entirely proper for the court of last resort to depart from the doctrine of earlier cases, and settle the law for the future in accordance with its firm convictions of what the law really is. This of course will not be done capriciously, nor merely because there is some doubt as to the correctness of the former decision. But the court must be satisfied that it was certainly, clearly, or plainly erroneous. When this is the case, it is proper to overrule it when it does not appear that it has been acted upon as a rule of property or that rights have vested under it or that its reversal would disturb vested interests,[58] when it is clear that the decision in question, regarded as a continuing rule of property, is injurious to the community generally and unjust in its operation,[59] or when,

[56] Ettor v. City of Tacoma, 57 Wash. 50, 107 Pac. 1061.

[57] Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; Higgins v. Bordages, 88 Tex. 458, 31 S. W. 803, 53 Am. St. Rep. 770.

[58] State v. Lewis, 69 Ohio St. 202, 69 N. E. 132; Truxton v. Fait & Slagle Co., 1 Pennewill (Del.) 483, 42 Atl. 431, 73 Am. St. Rep. 81.

[59] Linn v. Minor, 4 Nev. 462.

having relation to the general mercantile law, it is contrary to the accepted doctrine and to recognized business methods.[60]

But even where some hardship or injury must inevitably result from the overruling of the earlier decision, such action may become judicially a necessity, in the interest of the greater good of the greater number. In that case, the propriety of the step must be determined upon a weighing and balancing of the considerations for and against it. Among these is the importance of establishing the law on a just and right basis. But no mere conjecture or hesitation as to the legal soundness of the existing rule will be sufficient to warrant a departure from it. The error in the former decision must be most palpable.[61] But if so, and if it is evident that greater injury, mischief, or injustice will result from continuing the old rule in force than would result from its correction, then the court should prefer to take that course which will promote the general welfare and advantage and settle the law firmly on right principles, rather than to continue its adherence to a bad precedent for the sake of comparatively insignificant interests which may have vested under it.[62] As remarked by the Supreme Court of Mississippi, "all questions which have an important bearing upon titles to property, and which have been once carefully considered and solemnly settled by this court ought not to be treated as open for future investigation, unless it shall appear that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject." [63] Finally, when a change of decision becomes unavoidable, it should extend no further than is actually necessary.[64]

[60] Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635.

[61] Reed v. Ownby, 44 Mo. 206.

[62] Thoms v. Greenwood, 6 Ohio Dec. 639; Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17; Walling v. Bown, 9 Idaho, 740, 76 Pac. 318.

[63] Boon v. Bowers, 30 Miss. 256, 64 Am. Dec. 159.

[64] Board of Com'rs of Bayou Terre aux Bœufs Drainage Dist. v. Baker, 124 La. 216, 50 South. 16.

CHAPTER VI

THE LAW OF THE CASE

81. General Principle.
82. Further Proceedings in Appellate Court.
83. Subsequent Proceedings in Trial Court.
84. Proceedings Before Different Judge.
85. Character and Essentials of Decision.
86. Rulings on Motions and Demurrers.
87. What Points or Matters Concluded.
88. New Facts or New Parties.
89. Removal of Cause to Federal Court.

GENERAL PRINCIPLE

81. When a point or question arising in the course of a litigation is once solemnly and finally decided, the rule or principle of law announced as applicable to the facts presented becomes the law of that case in all its subsequent stages or developments, and is binding both upon the parties and their privies and also upon the court, so that the former will not be permitted, nor will the latter consent, to reopen the same issues for further consideration whatever grounds there may be for regarding that decision as erroneous.

The doctrine of "the law of the case" is a very well established principle of our jurisprudence, and the rule stated above is abundantly supported by the authorities. While its most familiar application is seen in the case of a second appeal or writ of error, after an appeal, reversal, and new trial in the court below, in which case the reviewing court will not hear argument on any matters determined by the decree of reversal nor reconsider the questions adjudicated on the former appeal,—as will be shown more fully in the succeeding sections,—yet it is equally applicable to all decisions of the trial court upon particular branches of the litigation or upon preliminary objections or issues. That

is to say, when a judgment or decree is pronounced in a cause, it is to be regarded as finally declaring the law applicable to the matters involved, subject, of course, to appeal or review; and in the absence of a successful appeal therefrom, if the cause proceeds to a further stage or a new branch of it, all further rulings and decisions will be made with reference to that judgment or decree, and nothing inconsistent with it can be alleged by the parties or held by the court. For the rule or principle of law announced, whatever may be thought of it as a general rule of law or in its application to other similar cases, becomes the fixed and irrevocable law of the case in which it was pronounced, that is, the immutable rule for the decision of all parts, branches, or developments of that same case, in so far as it applies. Numerous illustrations of the working of this doctrine, as well as authorities in support of the general rule stated, may be seen in the cases cited in the margin.[1]

This rule is supported by those considerations which sustain the general doctrine of stare decisis, namely, the importance of certainty and stability in the law, with this special and peculiar application, that nothing could be more important to the right and orderly administration of justice than to avoid the rendition of contradictory or repugnant decisions in the progress of the same cause. Also it finds

[1] City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321; Standard Sewing Mach. Co. v. Leslie, 118 Fed. 559, 55 C. C. A. 323; McKinney v. State ex rel. Nixon, 117 Ind. 26, 19 N. E. 613; Willson v. Binford, 81 Ind. 591; Terre Haute & I. R. Co. v. Baker, 4 Ind. App. 66, 30 N. E. 431; Board of Com'rs of Morgan County v. Pritchett, 85 Ind. 68; Richmond St. R. Co. v. Reed, 83 Ind. 9; Howe v. Fleming, 123 Ind. 262, 24 N. E. 238; Anderson v. Kramer, 93 Ind. 170; Armstrong v. Harshman, 93 Ind. 216; Medland v. Van Etten, 75 Neb. 794, 106 N. W. 1022; Guidet v. City of New York, 37 N. Y. Super. Ct. 124; Luchterhand v. Sears, 108 Mass. 552; People v. Rourke, 11 Abb. N. C. (N. Y.) 89; Grassmeyer v. Beeson, 18 Tex. 753, 70 Am. Dec. 309; Plattner Implement Co. v. Bradley, Alderson & Co., 40 Colo. 95, 90 Pac. 86; People ex rel. McCullough v. Snyder, 106 App. Div. 28, 94 N. Y. Supp. 541; Fortunato v. City of New York, 74 App. Div. 441, 77 N. Y. Supp. 575; Carpenter v. Carpenter, 126 Mich. 217, 85 N. W. 576; In re Lafferty's Estate, 230 Pa. 496, 79 Atl. 711.

a firm foundation in that principle of sound public policy which underlies the rule of res judicata, that it is important for the community in general, as well as for the parties immediately concerned, that each litigation should be brought to a definite and final close. On this principle, it is said that parties will not be permitted to waste the time of the courts by the repetition in new pleadings of claims which have been set up on the record and overruled at an earlier stage of the proceedings.[2]

But the theory of "the law of the case" differs in detail both from that of the doctrine of stare decisis and from the rule of res judicata or the conclusiveness of judgments. As to the former, it may be remarked that the particular decision in question may indeed constitute a precedent for the determination of the like question when it shall arise between other parties or in a different suit; and so far the doctrine of stare decisis would warrant an adherence to it on the part of the court which rendered it and all inferior courts. But, regarded as a precedent merely, the decision may be overruled or modified if afterwards deemed erroneous. Regarded as the law of the particular case, it cannot be reversed or departed from, even though it is erroneous. As observed by the Supreme Court of California, "a previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves." [3] And as to the statement that the law of the case cannot be changed in the particular case even though the court should afterwards come to the conclusion that it was erroneous, we quote as follows from another opinion of the same court: "The latter portion of that decision is in abrogation of one of the plainest principles of law; and if this case was a new one, I would not hesitate to overrule it. But legal rules deprive

[2] Hillyer v. Borough of Winsted, 77 Conn. 304, 59 Atl. 40.
[3] Phelan v. City and County of San Francisco, 20 Cal. 45.

us of the power to do so. The decision having been made in this case, it has become the law of the case, and it is not now the subject of revision." [4] Thus, for example, where the first decision in the cause was based upon a statute, and proceeded upon the ruling or assumption that the statute was operative and governed the rights of the parties, it must remain the law of that case, notwithstanding the fact that the court afterwards decides and declares, in another litigation, that the statute had already been repealed.[5]

As for the relation of this rule to the doctrine of the conclusiveness of judgments, it is to be noticed that the one has regard to subsequent stages or branches of the same suit, while the other is concerned with subsequent but independent suits. It is true that when a question in controversy has been once finally settled, so that the decision becomes the law of the case, it is binding on the parties (not alone on the court) and on all those claiming under or through them in all subsequent stages of the litigation.[6] But the rule of res judicata prevents the parties or their privies from maintaining a new and different suit upon the same cause of action already adjudicated, or from raising, in a second and independent controversy, the same issues which were settled for them by a former judgment. It is therefore a branch of the law of estoppel, and the estoppel which it creates attaches to the parties and their privies, so to speak, and follows them into their subsequent litigations.

[4] Dewey v. Gray, 2 Cal. 377. And see Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Bane v. Wick, 6 Ohio St. 13; Thomson v. Albert, 15 Md. 285.

[5] Board of Com'rs of Tipton County v. Indianapolis, P. & C. Ry. Co., 89 Ind. 101.

[6] Lowe v. Prospect Hill Cemetery Ass'n, 75 Neb. 85, 106 N. W. 429.

FURTHER PROCEEDINGS IN APPELLATE COURT

82. When a case has been decided in an appellate court, and afterwards comes there again by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision; the points of law already adjudicated become the law of the case, and are not to be reversed or departed from in any of its subsequent stages.

This rule finds its most usual illustration in the case where an appeal or writ of error results in the reversal of the judgment below and the grant of a new trial, which is duly had, and after the entry of the second judgment an appeal or writ of error is again taken. In this case, the appellate court will consider itself absolutely and irrevocably bound by the previous decision, so far as regards the particular case, and the matters and questions considered and decided on the first appeal will not be open for reconsideration or review on the second appeal. As to them, the first decision is the law of the case, and they are closed. Nothing will be reviewed but new facts, pleadings, or evidence, or proceedings in the court below subsequent to the first trial.[7]

[7] Washington Bridge Co. v. Stewart, 3 How. 425, 11 L. Ed. 658; Rector v. Danley, 14 Ark. 307; Stacy v. Vermont Cent. R. Co., 32 Vt. 552; Phelan v. City and County of San Francisco, 20 Cal. 45; City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321; Standard Sewing Mach. Co. v. Leslie, 118 Fed. 557, 55 C. C. A. 323; Terre Haute & I. R. Co. v. Baker, 4 Ind. App. 66, 30 N. E. 431; Board of Com'rs of Morgan County v. Pritchett, 85 Ind. 68; Richmond St. R. Co. v. Reed, 83 Ind. 9; Howe v. Fleming, 123 Ind. 262, 24 N. E. 238; Anderson v. Kramer, 93 Ind. 170; Jones v. Castor, 96 Ind. 307; Braden v. Graves, 85 Ind. 92; McKinney v. State ex rel. Nixon, 117 Ind. 26, 19 N. E. 613; Cole v. Wright, 70 Ind. 179; Mullany v. First Nat. Bank of Indianapolis, 89 Ind. 424; Board of Com'rs of Harrison County v. Cole, 8 Ind. App. 485, 36 N. E. 47; In re Cook's Estate, 143 Iowa, 733, 122 N. W. 578; Overall v. Ellis, 38 Mo. 209; Davidson v. Dallas, 15 Cal. 75; Heinlen v. Martin, 59 Cal. 181; Mason v. Burk, 120 Ind. 404, 22 N. E. 119; Continental Life Ins. Co. v. Houser, 111 Ind. 266, 12 N. E. 479.

The reasons of this rule are well explained in a decision of the Supreme Court of Vermont, from which we quote as follows: "The question is, will this court revise a former decision made by the same court in the same cause and on substantially the same state of facts? Such a decision presses itself upon the consideration of the court with a twofold force: first, as an authority, as though it were a decision made in any other case; second, as an adjudication between the parties, not as one that is conclusive as a matter of law, for the court may revise and reverse it, but as an adjudication that practically is to be regarded as having much the same effect. The rule has been long established in this state, often declared from the bench, and we believe uniformly adhered to, that in the same cause this court will not revise or reverse their former decisions. It is urged and there is force in the argument, that if there is error in the decision, and if it is ever to be reversed, it should be done in the same court. Although this position may be sound in theory as applicable to a single case, yet as a rule to be acted on in all cases it would lead to incalculable mischief. If all questions that have ever been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end of their litigation until the ability of the parties or the ingenuity of their counsel were exhausted. A rule that has been so long established and acted upon, and that is so important to the practical administration of justice in our courts, we think, should not be departed from. And whatever views the different members of this court may entertain as to the soundness of the former decision, we all agree that the doctrine there enunciated is to be regarded as the law of this case." [8] So also the Court of Appeals of Maryland, speaking of a litigation which had more than once engaged its attention, remarks: "This case is now before us for the fourth time. By the present appeal, we are asked to reverse the decree heretofore passed after mature deliberation, and subsequently reaffirmed upon a motion

[8] Stacy v. Vermont Cent. R. Co., 32 Vt. 552.

for a reargument. Precisely the same questions are involved now as were then passed upon and settled, and precisely the same parties are before us in precisely the same case. Under these circumstances, the decree passed by this court is binding not only on the court below, but also on this court, when the proceedings are reviewed upon a subsequent appeal." [9] To the same effect speaks the Supreme Court of Illinois. "There must be an end of litigation, and where a cause has been decided in the appellate court on appeal or writ of error, that court will not sit to review its former decision in respect of matters that were, or might have been, assigned for error upon the record then before the court; and where the decision of the appellate court is final, matters determined by it will not be re-examined in the same court on a subsequent writ of error brought on the same record. All such matters are regarded as res judicata. And the second appeal in the same case, when the judgment for reversal and remandment on the first appeal covers the entire merits of the controversy, will bring before the court of review only the proceedings had in the cause subsequently to the remandment. This follows necessarily from the fact that an appellate court is bound by its former final decisions and judgments upon the same record." [10]

Courts have sometimes intimated that they had the right, and were perhaps under the duty, of reversing a former ruling made in the same case if fully satisfied that it was wrong. Thus, in a case in Ohio, where the cause first came before the appellate court on demurrer to a bill in equity, and the demurrer was overruled, and the case came up again on bill, answer, and testimony, which did not substantially vary the case as it stood on the demurrer, it was said: "Although, if the case were now before us as an original one, and irrespective of any authoritative deter-

[9] Worthington v. Hiss (Md.) 23 Atl. 198, citing Mong v. Bell, 7 Gill (Md.) 244; Thomas v. Doub, 1 Md. 324; Emory v. Owings, 3 Md. 188; Brown v. Somerville, 8 Md. 444.

[10] Henning v. Eldridge, 146 Ill. 305, 33 N. E. 754. And see Willson v. Binford, 81 Ind. 588.

mination of the questions it presents, some of us might have arrived at conclusions differing from those announced by our predecessors, yet none of us are so clearly satisfied of error in the previous determination of the case as to feel ourselves justified in overruling it."[11] But the course which, it may be presumed, the court would have taken in this case if "clearly satisfied of error," would have been contrary to the general weight of authority and the general practice of appellate courts. It is the rule that a principle or rule of law laid down by an appellate court, and essential to the decision of the case before it, becomes the law of the case and will not be changed even though, on subsequent consideration, the same court may be of the opinion that its former decision was erroneous,[12] or even though, in other cases arising subsequently, and presenting similar facts, it has materially modified its former position or laid down an exactly contrary doctrine.[13] So also, a change in the organization or personnel of the appellate court, after a decision rendered in the case, with the effect that a majority of the judges, as the court now stands, are opposed to the previous decision,—or even that the new court is unanimously dissatisfied with it,—will not justify a reversal of the former ruling when the same case comes again before the court for consideration. The former decision is the law of the case, and so remains notwithstanding any changes in the composition of the court or in the opinions of its members.[14]

This rule, it should be observed, is followed not only by the courts of last resort but also by intermediate appellate courts, with this difference, however, as applicable to the latter, that the necessity of following at all times the decisions of the court of final appeal may involve a change of

[11] Bane v. Wick, 6 Ohio St. 13.

[12] Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

[13] Thomson v. Albert, 15 Md. 285; Jones v. Charleston & W. C. Ry. Co., 65 S. C. 410, 43 S. E. 884; Cullen v. Cullen, 23 Misc. Rep. 80, 50 N. Y. Supp. 433.

[14] Parker v. Pomeroy, 2 Wis. 112; Hawley v. Smith, 45 Ind. 183; Huffman v. State, 30 Ala. 532.

decision even in the progress of a cause. Thus if, in the interval between the first and second appeal to an intermediate appellate court, the court of last resort rules on the question involved, that ruling will be followed on the second appeal.[15] And it is not strictly necessary to the application of the rule that the issues involved should have been argued before the appellate court and considered and decided by it. For where a final decree has been rendered in the court below, and no appeal is taken from it, or an appeal is refused or a bill of review denied, all matters within the pleadings and jurisdiction of the court, expressed in the decree, are finally closed by it, and cannot be reopened in the same litigation or reviewed on appeal from a supplemental decree.[16] It should also be observed that the rule is sometimes extended, perhaps on the analogy of the doctrine of res judicata, to instances where the second appearance of the cause in the appellate court is in a new action, but between the same parties and on the same facts. Thus it is said in California that the fact that, after a decision of the Supreme Court, reversing and remanding a cause, the action is dismissed in the lower court, and no judgment is entered which could be pleaded in bar or given in evidence, does not prevent such decision from being the law of the case, to be followed in a subsequent action between the same parties for the same relief.[17]

It would be superfluous to adduce many illustrations of a rule so well known and so firmly established; but it may be remarked that it applies to decisions on questions of pleading and practice as well as on the merits of the controversy. Thus, where the supreme court on appeal passes on the sufficiency of a declaration or complaint, and reverses the judgment and remands the cause, the question is irreversibly settled for that suit, and becomes the law of the case in all its subsequent stages.[18] So, where a will has

[15] Thompson, Payne & Co. v. Irwin, Allen & Co., 76 Mo. App. 418.

[16] Baker v. Watts, 101 Va. 702, 44 S. E. 929; Quinton v. Neville, 154 Fed. 432, 83 C. C. A. 252.

[17] Reed v. Ring, 93 Cal. 96, 28 Pac. 851.

[18] Armstrong v. Harshman, 93 Ind. 216; Mason v. Burk, 120 Ind. 404, 22 N. E. 119; Dugan v. Fowler, 14 Ark. 132.

been interpreted and acted on in former decisions, they will, as having settled the law for the parties, be followed, although as res nova the question might have been otherwise decided.[19]

SUBSEQUENT PROCEEDINGS IN TRIAL COURT

83. Where a cause has been heard and determined by an appellate court, the rules and principles of law laid down as applicable to it are imperatively binding upon the trial court in all further proceedings in the same action, and cannot be reviewed, ignored, or departed from. So also, the trial court is bound by its own former judgment or decree in the same cause, if no appeal was taken from it or if it was affirmed on appeal.[20]

This rule means not only that the court of first instance must accept and follow the directions of the court of appeal as to the further action to be taken in the cause, or as to the judgment or decree to be entered, when the case is sent back to it after an appeal, but also that the rules and principles of that decision preclude any further inquiry into the matters covered by it and furnish the inflexible rule for the government of all subsequent proceedings in the same litigation. They are not to be reviewed or questioned. Parties cannot be heard to impeach the decision of the appellate court for error. Nothing inconsistent with its determination can be alleged or ordered. This principle is illustrated by a case in a circuit court of the United States in which, the action being for partition, a decree was entered for the sale of the property and distribution of the

[19] Henderson's Heirs v. Rost, 11 La. Ann. 541.

[20] Martin v. People's Bank (C. C.) 115 Fed. 226; Aultman & Co. v. Utsey, 49 S. C. 399, 27 S. E. 405; Wooster v. Handy (C. C.) 21 Fed. 51; Brennan v. Mayor, etc., of City of New York, 1 Hun (N. Y.) 315; In re Ransier, 26 Misc. Rep. 582, 57 N. Y. Supp. 650; Succession of Henry, 116 La. 202, 40 South. 635; St. Regis Paper Co. v. Santa Clara Lumber Co., 34 Misc. Rep. 428, 69 N. Y. Supp. 904.

proceeds. An appeal was taken to the circuit court of appeals, and thereupon the owner of a life interest in an undivided portion of the estate filed a petition for leave to intervene in the cause, and asking specially that his interest should be allotted to him in severalty. But the circuit court of appeals affirmed the decree without mentioning the intervener and ordered the sale of the entire property. The parties then appeared again in the circuit court and filed a petition for a hearing on the claim of the intervener and a determination of his rights, and that the decree should be amended in accordance with the decision thereon, alleging that the decision of the circuit court of appeals was erroneous in law and based on a mistake as to some of the facts. But the application was denied, Simonton, J., saying: "This court has no right to inquire whether the circuit court of appeals erred in any particular, nor can it sit in review of that court. The petitioners could have prayed a rehearing, or could have invited a review by the Supreme Court. No inferior tribunal can afford them relief. It follows, therefore, that so much of the prayer of the petition as asks that the decree be amended cannot be entertained." [21]

This case may also be taken as an illustration of the principle that the decision of the appellate court on some branch of the litigation, or even on some preliminary question, may so affect the root or foundation of the whole controversy as to preclude any further proceedings of any kind in the trial court. Thus, where the title of a public officer is in question and it is determined, on appeal, that the statute under which he was appointed was unconstitutional, an action brought in the court of first instance to recover compensation for his services is properly dismissed and the order of dismissal will be affirmed on appeal on the principle of stare decisis.[22] So, in another case, an action was brought to compel specific performance of a contract to deliver a certain quantity of pulp wood for a term of years, and an injunction was asked and granted, restraining the defendant from alienating certain lands from which the

[21] Martin v. People's Bank (C. C.) 115 Fed. 226.
[22] Brennan v. Mayor, etc., of City of New York, 1 Hun (N. Y.) 315.

supply was to be drawn. But the appellate court decided that the facts showed only a contract for the sale of chattels, as to which specific performance should not be granted, and set aside the injunction. And thereafter, when the case came up again for trial, it was held that the trial court must dismiss it, since the judgment of the appellate court determined that the case presented no ground for equitable relief.[23]

If, however, the decision above is not of such a nature as to preclude further proceedings below, at least it must be taken as the unquestionable rule for the determination of all such subsequent proceedings, in so far as it may cover the issues or questions arising in the subsequent stages of the cause. And it makes no difference that the decision of the appellate court was clearly erroneous,[24] or that it may so appear to the mind of the trial judge. It is none the less the law of the case. Inferior courts have sometimes sought to rid themselves of the necessity of thus making orders or entering judgments which appeared to them to be directly contrary to the true doctrine of the law, by narrowing as far as possible the effect of the decision of the appellate court, and holding themselves absolved from obedience to anything but the bare words of the remittitur or order of remand. But they have been rebuked for so doing, and have been somewhat sternly taught that the entire opinion of the appellate court must be taken as the absolute norm for their future governance, excluding mere dicta or matters stated by way of argument or illustration, but including all the rules and principles of law specifically laid down and essential to the determination of the case.[25]

Further, if the trial court makes a decree which is final as to the facts involved or as to a particular branch of the controversy, and no steps are taken to obtain a review of it by appeal or otherwise, it becomes the law of the case to govern the further proceedings, and it will not be re-

[23] St. Regis Paper Co. v. Santa Clara Lumber Co., 34 Misc. Rep. 428, 69 N. Y. Supp. 904.

[24] In re Ransler, 26 Misc. Rep. 582, 57 N. Y. Supp. 650.

[25] Attorney General ex rel. Cushing v. Lum, 2 Wis. 514.

viewed or reconsidered by the court, nor will the parties be permitted to set up any claims or defenses inconsistent with the points which it decided.[26]

PROCEEDINGS BEFORE DIFFERENT JUDGE

84. Since a ruling or decision made in the progress of a cause by the trial court becomes the law of the case, if not reversed or modified on appeal, it should not be set aside or changed in the subsequent proceedings in the same case in the same court, though these are had before a different judge, who may take a different view of the law.

It may be admitted that this rule is not inflexible, and that, when observed, it rests rather on a basis of judicial comity and propriety than of strict judicial obligation. The courts of last resort in several of the states have clearly stated that a judge of a court of first instance is not absolutely bound to adopt and abide by the rulings and decisions made in the earlier stages of the same cause by his predecessor in office or by another judge sitting in the same court, if they do not appear to him to be correct in matter of law.[27] And it is probably true that no rule of law, written or unwritten, could be pointed out which would make it the imperative duty of a judge to abide by the opinions and decisions of his associate on the bench or of his predecessor, or make his refusal to do so "error" in the technical sense. Perhaps it may be said that this is a matter resting in his sound judicial discretion. At any

[26] Succession of Henry, 116 La. 202, 40 South. 635; Maloney v. Jones (Tenn. Ch. App.) 59 S. W. 700; Brennan v. Mayor, etc., of City of New York, 1 Hun (N. Y.) 315.

[27] Seery v. Murray, 107 Iowa, 384, 77 N. W. 1058; Richman v. Supervisors of Muscatine County, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308; Schempp v. Beardsley, 83 Conn. 34, 75 Atl. 141; Whittle v. Jones, 82 S. C. 551, 64 S. E. 403; Parrot v. Mexican Cent. Ry. Co., 207 Mass. 184, 93 N. E. 590; Rice v. Van Why, 49 Colo. 7, 111 Pac. 599.

rate it is not the custom of appellate courts to reverse a judgment merely because it involves a change or reversal of the action previously taken in the same cause by another judge, or without consideration of the question which of the contrariant opinions correctly expounded the law. Thus, it is said by the court in Nebraska that a judgment for the defendant in an action, on sufficient pleadings and evidence, will not be reversed because another judge of the same court had, before the trial, sustained a general demurrer to the answer, the answer having been amended by leave of court after ruling on the demurrer, although no evidence was offered on the trial to support the allegations brought into the answer by such amendment.[28]

Certainly it must not be forgotten that the paramount duty of a judge is to do justice and administer the law as he understands it. And if he finds in the rulings or decisions of his associate or predecessor such manifest and glaring error as would most certainly call for a reversal by the court above, it may be his duty to correct the mistake at any subsequent stage of the cause when the opportunity arises. But in the absence of such an overwhelming conviction of error, very strong reasons should incline him to respect and abide by the previous determinations, though his personal opinion of the law may not coincide with them. For, in the first place, a final decision or order, if not reversed or modified on appeal, becomes the law of the case in such sense that the same judge who made it would be bound to abide by it in the further progress of the controversy. For the same reason, then, his associate or successor should equally regard it as conclusive. For different judges of the same court have no appellate jurisdiction over each other. The sitting judge is "the court," but he is no more than the court. In the next place, the wholesome doctrines of the finality of judicial decisions and of respect for precedents enter into the question and are entitled to weighty influence. Finally, the unseemly spectacle of different judges of the same court overruling each other's de-

[28] Perry v. Baker, 61 Neb. 841, 86 N. W. 692.

cisions in the same cause tends to unsettle men's minds and impair their confidence in the stability of the law and the unerring wisdom of the judiciary. These considerations have often been noticed by the courts; and, notwithstanding the decisions mentioned above, it may be stated as the general rule that a judge of the trial court will not consent to revise or reverse the rulings and decisions made in the earlier stages of the same cause by another judge of the same court, at least in the absence of very plain and palpable mistake. This rule is followed with practically unvarying uniformity by the courts of the United States,[29] and by the courts in several of the states.[30] In further support of it we may appropriately quote the very sensible and cogent remarks of Mr. District Judge Coxe in a case in one of the inferior federal courts. "It is of course my duty," said he, "to follow the decisions of this court and of the circuit court of appeals even though a different opinion may be entertained upon some of the propositions involved. Different judges do not make different courts. When the circuit court has spoken through any of its judges, its decision should be, and generally is, regarded as controlling upon all the others. This is the spirit of American jurisprudence. We sacrifice much to precedent. A proposition once decided between the same parties on similar facts must stand decided. It is of little moment that the decision was made by another than the sitting judge.

[29] Oglesby v. Attrill (C. C.) 14 Fed. 214; Plattner Implement Co. v. International Harvester Co. of America, 133 Fed. 376, 66 C. C. A. 438; Boatmen's Bank of St. Louis, Mo., v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Taylor v. Decatur Mineral & Land Co. (C. C.) 112 Fed. 449; Louis Snyder's Sons Co. v. Armstrong (C. C.) 37 Fed. 18; Cole Silver-Min. Co. v. Virginia & Gold Hill Water Co., 1 Sawy. 685, Fed. Cas. No. 2,990; Hadden v. Natchaug Silk Co. (C. C.) 84 Fed. 80; Central Trust Co. of New York v. United States Flour Milling Co. (C. C.) 113 Fed. 587.

[30] In re Cullinan, 109 App. Div. 816, 96 N. Y. Supp. 751; Peel v. Elliott, 16 How. Prac. (N. Y.) 484; Hunter v. Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907; Hungerford v. Cushing, 2 Wis. 411; Aldrich v. Newburgh News Printing & Publishing Co., 70 Misc. Rep. 126, 128 N. Y. Supp. 51.

If entitled to any consideration, this circumstance gives the decision even greater weight. A judge may change his own mind; he cannot change the mind of another." [31]

CHARACTER AND ESSENTIALS OF DECISION

85. In order that a ruling or decision should become the law of the case, it is necessary that it should be final so far as concerns the particular matters involved, within the jurisdiction of the court and entered at a proper stage of the cause, determinative of the merits of the particular part of the litigation to which it relates, and deciding and stating the rule or principle of law applicable to the case, as distinguished from a mere finding of facts or a decision on a pure question of fact.

It is clear that if a judgment or order was merely interlocutory, it cannot be considered such an adjudication of the question involved as to prevent its reconsideration or modification at a subsequent stage of the proceedings, under the doctrine of the law of the case. And if it was rendered without jurisdiction, it cannot have any of the usual effects of a judicial decision. The same principle has also been applied to a suit in equity involving the title to real estate, where a decree ordering a conveyance to be made by a third person will not stand in the way of a final decree settling the ultimate rights of the parties, if it appears that such first decree was prematurely entered and irregular.[32] But it is not necessary that a judgment or decree should dispose of the entire controversy, in order to govern the further proceedings, but only that it should be complete and final as to the particular matter or question involved. Thus, the determination of a question of law made upon

[31] Hadden v. Natchaug Silk Co. (C. C.) 84 Fed. 80.
[32] Goff v. Hathaway, 180 Mass. 497, 62 N. E. 722.

reversing an order granting a preliminary injunction may become the law of the case.[33] So again, where a defendant interposes a cross petition, praying for the reformation of a written instrument on which the plaintiff's cause of action is founded, on the ground of mutual mistake, the finding and judgment of the court thereon, so long as it remains in force, is conclusive, in all the further progress of the cause, as to the allegations of mistake.[34] As to the judgment upon a plea in abatement, the matter is not so clear. Ordinarily such preliminary decisions do not involve the merits of the controversy, and, lacking the character of finality, they are neither a bar to further proceedings nor to be regarded as governing them.[35] But the issue raised on such a plea may present a state of facts from which there will emerge a question of law, to be decided according to the application of some general rule or principle, and which, while preliminary to the main controversy, will affect the ultimate rights of the parties, such, for example, as a question of domicile, of alleged misnomer of a corporation, or of the sufficiency of a defense. When a question of this kind arises on a plea in abatement and is determined, the decision becomes the law of the case, and its correctness cannot be challenged in the subsequent proceedings.[36]

The rule of the law of the case applies also to the decision of questions of jurisdiction as well as to questions of substantive law; and when an appellate court, for instance, has expressly decided in favor of its own jurisdiction in the case, or that of the court below, or even when its affirmance of jurisdiction is to be implied from the fact that it took jurisdiction and proceeded to decide

[33] Western Union Tel. Co. v. City of Toledo, 121 Fed. 734, 58 C. C. A. 16.

[34] Reiff v. Mullholland, 65 Ohio St. 178, 62 N. E. 124.

[35] Lyons v. Hammond Elevator Co., 139 Ill. App. 495; Sessinghaus v. Knoche, 137 Mo. App. 323, 118 S. W. 104.

[36] Brown v. Mount Battie Mfg. Co., 104 Me. 456, 72 Atl. 183; Miller & Lux v. Rickey (C. C.) 146 Fed. 574.

the cause, this question will be closed against reconsideration in any subsequent proceedings in the same cause.[37]

But the rule under consideration presupposes that the decision, which is to govern further proceedings in the case and mark out the limits of judicial investigation, is a decision upon a question of law. Findings of fact may indeed be conclusive between the parties, but for a different reason and on a different principle. The doctrine of the law of the case contemplates only a decision which states the rule or principle of law held applicable to the particular issue involved and which is determinative of it. Hence it is agreed by the authorities that this doctrine is to be restricted to the determination of questions of law between the same parties at former hearings, and not extended to questions of fact, except, perhaps, when essentially the same questions are presented for a second review.[38] For instance, in a divorce suit, on the hearing of an application for temporary alimony, there was brought in issue the validity of a contract made between the husband and wife at the time of their separation, whereby provision was made for her separate maintenance. This was assailed on the ground of fraud, and the determination of this point depended on questions of fact. The trial judge found that the contract was void. But it was held that this did not prevent a reconsideration of the same question on a trial of the application for permanent alimony.[39] On the same principle, the damages awarded at a trial of an action for personal injuries furnish no precedent for a verdict on a subsequent trial, where the evidence of the extent and permanence of the injury may have been stronger on the latter trial than at the former.[40]

[37] Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. Ed. 658; Clary v. Hoagland, 6 Cal. 685; Turner v. Indianapolis B. & W. Ry. Co., 8 Biss. 380, Fed. Cas. No. 14,259; Campau v. Detroit Driving Club, 144 Mich. 80, 107 N. W. 1063.

[38] Phelps County Farmers' Mut. Ins. Co. v. Johnston, 66 Neb. 590, 92 N. W. 576; Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727.

[39] Sumner v. Sumner, 121 Ga. 1, 48 S. E. 727.

[40] Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647.

RULINGS ON MOTIONS AND DEMURRERS

86. Decisions on motions, demurrers, or other proceedings incidental or collateral to the main controversy, do not generally become the law of the case in such sense as absolutely to preclude further inquiry; but parties cannot claim as a right the privilege of re-opening questions thus settled, and it is proper for the court to refuse to reconsider them.

On account of their lack of finality, rulings on motions and other applications made in the progress of a cause, and which do not dispose of the merits or affect the substantial rights of the parties, but are only incidental or collateral to the main controversy, are not considered as within the doctrine of res judicata or conclusive on the parties as to the facts involved.[41] And for the same reason, as concerns the questions of law involved and passed on, such rulings or orders are not technically binding on the court, as the law of the case, except that, as between the same parties and on the same showing of facts, the court is not required to consider the same question a second time.[42] When the legal effect of a given transaction or state of facts, affecting in some way the rights of the parties or the further proceedings in the cause, has been duly considered and decided by the court on a motion or application in that behalf,—such as a motion to dismiss the suit, or to quash an information, or for leave to amend a pleading, or to cancel a notice,—the defeated party has no absolute right to renew the same contention and obtain another hearing on some different form of application or plea, and to refuse his demand is not error for which the

[41] See Black, Judgm. §§ 691, 692.

[42] Castle v. City of Madison, 113 Wis. 346, 89 N. W. 156; Bank of Santa Fé v. Haskell County Bank, 59 Kan. 354, 53 Pac. 132; Grossman Bros. & Rosenbaum v. Atlas Const. Co. (Sup.) 119 N. Y. Supp. 164; Virginia-Carolina Chemical Co. v. Kirven, 57 S. C. 445, 35 S. E. 745. But compare In re Post's Estate, 30 Misc. Rep. 551, 64 N. Y. Supp. 369.

judgment should be reversed.[43] But at the same time, if the court doubts the correctness of its former ruling, or desires a more thorough investigation of the question involved, it is no abuse of its discretion to permit the same question to be re-opened in another form.[44] The same principle applies to rulings and decisions on the admission of evidence. Thus, in a case in Georgia, an auditor's report was remanded because of the exclusion of certain testimony which the court held to be competent, and on a second hearing before the auditor the testimony was admitted. But it was held that this did not prevent the court from changing its ruling and deciding finally that the testimony was incompetent.[45]

A demurrer raises an issue of law, and it is generally held that the decision on a demurrer becomes the law of the case, so as to make it entirely proper, even if not strictly necessary, for the court to refuse any further hearing on the identical question presented and determined.[46] But it must be admitted that there are decisions to the contrary.[47] And at any rate the effect of the ruling, as precluding further controversy, must be strictly confined to the case as presented by the demurrer and the precise question passed on. Thus, if the demurrer is sustained, and the pleading is afterwards amended so as

[43] Martin v. Chicago & M. Electric Ry. Co., 220 Ill. 97, 77 N. E. 86; State ex rel. Richards v. Brooks, 1 Boyce (Del.) 129, 74 Atl. 599; P. H. & F. M. Roots Co. v. New York Foundry Co., 54 Misc. Rep. 635, 104 N. Y. Supp. 785; Lipschutz v. Horton, 55 Misc. Rep. 44, 104 N. Y. Supp. 850.

[44] Dozier Lumber Co. v. Smith-Isburg Lumber Co., 145 Ala. 317, 39 South. 714.

[45] Langford v. Wilkinson County Com'rs, 75 Ga. 502. And see Connecticut River Power Co. v. Dickinson, 75 N. H. 353, 74 Atl. 585. But compare People v. Swaile, 12 Cal. App. 192, 107 Pac. 134.

[46] Wakelee v. Davis (C. C.) 44 Fed. 532; Montgomery v. McDermott (C. C.) 90 Fed. 502; Steiner v. Anderson (Tex. Civ. App.) 130 S. W. 261.

[47] De La Beckwith v. Superior Court of Colusa County, 146 Cal. 496, 80 Pac. 717; Fulton County Gas & Electric Co. v. Hudson River Telephone Co., 130 App. Div. 343, 114 N. Y. Supp. 642; Gerard v. Ives, 78 Conn. 485, 62 Atl. 607.

to introduce new facts or materially change the cause of action or defense, the former decision is no bar to a consideration of the legal effect of the amended pleading, either on a second demurrer or in the progress of the cause.[48] It is otherwise, however, if the amendments are immaterial or do not change the legal aspect of the pleading. Here the former decision is to be regarded as conclusive and controlling.[49] And so also where the question of law raised by a second demurrer is precisely the same as that previously determined, notwithstanding an amendment to the pleadings.[50] Again, while a judgment on demurrer is conclusive as to the material facts confessed by it, the same as if they were put in issue and established by verdict, it is not so as to other issues raised by a new pleading after the decision on the demurrer.[51] And a ruling on a demurrer to the complaint, the effect of which is to establish the validity of the contract in suit, is not conclusive as to that point under the evidence introduced on the trial.[52] So again, in a suit to determine adverse title to land, where the claims of the defendant were submitted to the test of a demurrer, but the decision was merely that their sufficiency could not be attacked in that way, this will not make it reversible error for the court to rule, on the trial, that the claims in question are not sufficient to support a verdict for the defendant.[53]

[48] Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774; Central of Georgia R. Co. v. Waldo, 6 Ga. App. 840, 65 S. E. 1098; Darling v. Blazek, 142 Iowa, 355, 120 N. W. 961.

[49] Meeker v. Lehigh Valley R. Co. (C. C.) 175 Fed. 320.

[50] Hedding v. Gallagher, 70 N. H. 631, 47 Atl. 614.

[51] Wapello State Sav. Bank v. Colton, 143 Iowa, 359, 122 N. W. 149.

[52] Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 59 Atl. 607.

[53] Dawson v. Town of Orange, 78 Conn. 96, 61 Atl. 101.

WHAT POINTS OR MATTERS CONCLUDED

87. The matters and questions concluded by a judicial decision, regarded as the law of the case, and which, by reason of it, are closed against further consideration, are all such issues as were actually involved and passed upon and decided, or which were pertinent to the case and might properly have been considered and determined and were not expressly reserved, and such points or propositions as are necessarily to be implied from the disposition made of the case, but not matters covered by mere suggestions, obiter dicta, or extra-judicial opinions.

Primarily the effect of a decision as the law of the case is to be restricted to the propositions of law actually decided and applicable to the facts in judgment.[54] But it has sometimes been intimated that the conclusive effect of a decision of an appellate court should be so extended as to embrace matters and questions not actually considered, or even not present in the record, but which arose in the progress of the trial below and which might properly have been brought to the attention of the appellate court, and which, if considered by it, might have influenced its determination of the cause. It is remarked by a learned writer that "where a supreme court remands a cause with directions as to what decree shall be entered, a party cannot on a subsequent appeal assign for error any cause that accrued prior to the former decision, although not passed upon before, because a party ought not to be allowed to have his cause partly heard at one time and partly at another; and besides, it might result in two contradictory and repugnant judgments between the same parties."[55] It may be conceded that this is correct as to objections or

[54] Heidt v. Minor, 113 Cal. 385, 45 Pac. 700.

[55] Wells, Res Adj. p. 572, citing Ogden v. Larrabee, 70 Ill. 510; Matthews v. Sands, 29 Ala. 140.

exceptions taken below but not incorporated in the record or presented to the appellate court, and that a party taking an appeal or writ of error is bound to make the most of it and to say all that he has to say against the judgment at one time. But this is rather a question of appellate procedure than of the "law of the case." And in the usual case of a record on appeal which presents numerous assignments of error, some of which are expressly decided by the reviewing court, while others are either expressly reserved or left unnoticed, we apprehend that the conclusive effect of the decision as the law of the case must be rigorously limited to the specific points actually ruled and decided. Where, for instance, a supreme court concludes its opinion with the words so often found in the reports, "we deem it unnecessary to consider the other assignments of error in this case, for the reason that the conclusions already reached require a reversal of the judgment below," it must be evident that there is nothing to prevent the party from again bringing forward those undetermined issues on a second appeal, or to prevent the appellate court from giving them consideration. And indeed, we have an express decision to the effect that an issue not essential to the determination of the action, and which is shown by the record to have been left undetermined, although it might have been adjudicated, is not concluded by the judgment, and may be raised in further proceedings in the case.[56]

But besides the propositions of law specifically decided in the case, those also are concluded which are derivable by necessary implication from the judgment pronounced. That is, where the judgment actually rendered could not legally have been given,—or the disposition actually made of the case could not legally have been made,—without deciding a particular question in a particular way, the decision of it is necessarily implied in the final judgment, though it was not expressly mentioned, and it will be closed against consideration in any further proceedings under

[56] Brennan v. American Sulphur & Min. Co., 45 Colo. 248, 100 Pac. 412.

the doctrine of the law of the case.[57] To illustrate, where a federal court dismisses a bill in equity against the members of a partnership, on the ground that some of the partners are citizens of the same state with the complainant, and therefore it cannot take jurisdiction, there is necessarily implied in this ruling a decision that the defendants in question are necessary parties to the action, because, if it were otherwise, the case might be allowed to proceed in the federal court without regard to their presence on the record. Hence, so long as this decision remains unreversed, the complainant should not be granted leave to amend by striking out their names and continuing the action against the remaining defendants.[58] But this implication of a decision on a particular point from the final judgment or disposition of the cause must be a strictly necessary implication; and it will not be presumed that an appellate court adjudicated a question not before it and not involved in the case presented to it.[59]

To ascertain the scope of a decision as the law of the case it must further be resolved into one or a series of propositions of law, necessary to be adjudicated in order to make a right disposition of the controversy, and actually considered and passed on by the court. Nothing is concluded by the decision, or to be regarded as the law of the case, which is merely suggested or alluded to, or which is introduced into an opinion merely by way of illustration or argument or hypothesis, or which is merely obiter dictum or an unnecessary expression of opinion on the part of the court.[60] For instance, where a trial judge intimates that a stipulation of facts between the parties is not binding, and grants a continuance in order to let them prepare for a jury trial, the judge before whom the case comes to trial is not bound by the suggestion as to the validity of

[57] Forgerson v. Smith, 104 Ind. 246, 3 N. E. 866; McKinney v. State ex rel. Nixon, 117 Ind. 26, 19 N. E. 613.

[58] Raphael v. Trask (C. C.) 118 Fed. 678.

[59] O'Brien v. Moffitt, 133 Ind. 660, 33 N. E. 616, 36 Am. St. Rep. 566.

[60] Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Williams v. Miles, 68 Neb. 463, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431.

the stipulation.[61] But where the judge of the court below, in ruling on the whole case or on a point presented to him, makes a statement as to a matter of law involved, and this statement is quoted with approval by the supreme court in determining the case on appeal, the ruling of law so made constitutes the law of the case in a subsequent proceeding to construe the decree then rendered.[62] It is not always easy to determine the exact scope of a judicial decision, or to disentangle points decided from extra-judicial opinions. And in case of doubt, it is proper for the trial court to follow any intimations or suggestions which the supreme court may have given as to the scope and effect of its decision in question. As judiciously observed by a court in Missouri, it is the duty of the inferior court to follow the application by the supreme court of its own declaration of the law, when there is apparently a conflict between the declaration and the application thereof thus made.[63]

When the appellate court has based its judgment in a case upon the concessions of counsel, it is not precluded, on another trial, from questioning the legal soundness of those concessions; but it seems that the parties themselves are not at liberty to dispute the ground of the judgment, but must be governed throughout by the rule first laid down.[64]

NEW FACTS OR NEW PARTIES

88. A former decision will not stand as the law of the case and prevent a further consideration of the questions involved, when new facts or materially different evidence are presented at a subsequent stage of the case, which legally differentiate the case as then presented from that formerly decided, or

[61] Brown v. Pechman, 55 S. C. 555, 33 S. E. 732.

[62] Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 144 Fed. 476.

[63] Stevens v. Crane, 44 Mo. App. 275.

[64] Henry v. Quackenbush, 48 Mich. 415, 12 N. W. 634.

when new parties come in, who were not previously heard, or whose interests or claims are materially different from those already adjudicated.

Since the scope and effect of a judicial decision are always to be restricted to the facts upon which it was based, it must be evident that, after the trial and determination of a cause, and on a new trial or further proceedings in the same controversy a changed state of facts may be presented, or new facts added to those before in evidence, or testimony of an entirely different character introduced, and in consequence thereof, the former decision in the case is no longer applicable to the case as now presented, and it cannot be affirmed with certainty that that decision would have been rendered if the new facts or evidence had been before the court. When this is the case, the earlier decision is no longer the law of the case, nor does it prevent a fresh consideration and determination of it.[65] "If the facts change on a second trial of the whole cause in the court below, after remanding, these may so change the nature of the case as to require a new decision as applicable thereto; and if so, the former decision ceases, under the new development, to be the law of the case. For it is clear that a party on a retrial de novo may introduce new evidence and establish an entirely different state of facts, to conform to which is no violation of principle in a court, even if thereby it does set aside its former decision as inapplicable, and adopt a new one as suited to the new phase of the controversy."[66] For example, on an appeal in an action of ejectment, it was held that the plaintiff was not entitled to recover, on the ground that a deed of trust under which he claimed was a forgery. But in a subsequent action it appeared that the grantor in that deed, whose name was alleged to have been forged, had held only a life estate in the land and that, before the bringing of such

[65] Mahan v. Wood, 79 Cal. 258, 21 Pac. 757; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; Knight v. Finney, 59 Neb. 274, 80 N. W. 912.

[66] Wells, Res Adj. p. 572.

subsequent action, the entire title to the land had descended to the alleged forger as remainderman. It was therefore held that the decision in the prior action was not controlling of the subsequent one.[67] So again, a decree refusing to set aside a tax deed, where the bill for such relief was based purely on the ground that the complainant had made a proper redemption, is not the law of the case in such sense as to prevent him from assailing the validity of the deed on entirely different grounds.[68] But it is necessary that either the new facts or the new evidence should be such as materially to change the legal aspect of the case and influence its decision. For instance, where a federal court has sustained the validity of a patent after full consideration in a contested case, it is not required to enter upon a re-examination of the whole question in a second case on the same evidence or on additional evidence which is merely cumulative.[69] And further where the judgment of the court below is reversed on appeal or error, and the case remanded for a new trial, and on the second trial the pleadings are changed, new facts introduced, or new evidence presented, and an appeal again taken from the judgment, the court above will not review or revise its former decision entirely, unless the altered complexion of the case makes an entire reconsideration necessary. So far as the former decision is applicable, it will be adhered to, and the appellant can only bring up for review the proceedings subsequent to the reversal.[70]

The same principle applies where a second trial or hearing in a case involves new parties, who have not had their day in court, or are not in privity with the original parties, or whose claims, defenses, or interests are materially different from those already adjudicated. They are not to be precluded by the former decision from a full investigation

[67] Finley v. Babb, 173 Mo. 257, 73 S. W. 180.

[68] Gage v. Parker, 178 Ill. 455, 53 N. E. 317.

[69] Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York, 162 Fed. 892, 89 C. C. A. 582.

[70] Dodge v. Gaylord, 53 Ind. 365.

of their rights and a decision thereon.[71] But when the question decided on the first trial (or appeal) is broad enough to settle and dispose of the rights and claims of all interested parties, those who were brought in as parties on the record, or who had notice and an opportunity to come in and make good their claims, will not be permitted to open up the controversy for an entirely fresh consideration, even though they did not actively participate in the first trial. Thus, one of the persons to whom devises were made in the same terms having sold part of his share and brought suit, to which all the other devisees were parties, praying for a decree that he had a perfect title in fee simple, and asking for specific performance, the decree so construing the will, being affirmed, is the law of the case as to the construction of the will, as regards the rest of the land and the other devisees.[72] So again, a decree dissolving a stock insurance company, in a suit at the instance of stockholders, is conclusive on the policy holders and other claimants, who had notice of the proceeding, so far as concerns the question of dissolution.[73]

REMOVAL OF CAUSE TO FEDERAL COURT

89. Where a suit pending in a state court is removed for trial into a federal court, under the act of Congress in that behalf, the rulings and decisions previously made by the state court are binding on the federal court, as the law of the case, and will not be revised or changed, except as to details in which the procedure of the United States courts is specifically prescribed by the federal laws.

The removal of a cause from a state court to a federal court, as authorized by the acts of Congress in certain

[71] Millbourn v. Baugher, 43 Ind. App. 35, 86 N. E. 874; Goff v. Hathaway, 180 Mass. 497, 62 N. E. 722; Castle v. City of Madison, 113 Wis. 346, 89 N. W. 156.

[72] In re Devine's Estate, 199 Pa. 250, 48 Atl. 1072.

[73] Ensworth v. National Life Ass'n, 81 Conn. 592, 71 Atl. 791.

cases, is a change of venue, but not an appeal. The federal court does not sit as a court of error to review what has already been done or ordered by the state court in the cause. "The transfer of the suit from the state court to the United States court does not vacate what had been done in the state court previous to the removal. The circuit court, when a transfer has been effected, takes the case in the condition it was in when the state court was deprived of its jurisdiction. The circuit court has no more power over what was done before the removal than the state court would have had if the suit had remained therein. It takes the case up where the state court left it off." [74] It follows that rulings made or decisions rendered in the case, before its removal, are the law of the case, and that questions which have been passed upon by the courts of the state cannot be reviewed, reversed, or in any manner set aside by the federal court after its jurisdiction attaches.[75] Thus, any ruling on a demurrer in the state court is the same as though made in the federal court; the conclusiveness of the ruling is the same as if it had been made by the judge of the federal court in the same case at a prior term.[76] And if the demurrer has been passed upon by the supreme court of the state, it is as binding on the federal court as it would have been on the state court of original jurisdiction.[77] And where decrees have been made in the state court as to incidental questions involved in the suit, and from which appeals have been taken to the appellate court of the state, and then the cause is removed, the decision of the appellate court on such questions will be duly carried out by the federal court in the same manner as would have been done by the state court if the cause

[74] Duncan v. Gegan, 101 U. S. 812, 25 L. Ed. 875; Black's Dillon on Removal of Causes, § 209.

[75] Brooks v. Farwell (C. C.) 4 Fed. 166, 2 McCrary, 220; Cleaver v. Traders' Ins. Co. (C. C.) 40 Fed. 711; King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 331, 12 C. C. A. 145.

[76] Davis v. St. Louis & S. F. R. Co. (C. C.) 25 Fed. 786.

[77] Lookout Mountain R. Co. v. Houston (C. C.) 44 Fed. 449.

had remained therein.[78] So as to preliminary, provisional, or interlocutory orders made by the state court before the removal. If that court acted within its jurisdiction, the federal court will not review such orders, but will take the case precisely as it finds it, accepting all prior decrees and orders as adjudications in the cause.[79] Thus, where the defendant has removed a cause from the state court after the denial of a motion by the state court to set aside the service of the summons, he cannot renew such motion in the federal court without having obtained leave to do so, either from the state court or the federal court.[80]

But the federal court has the same power to reverse or modify interlocutory orders or decrees of the state court as that court would have had if the cause had remained within its cognizance, or as the federal court itself would have if the suit had originally been brought therein.[81] Thus, a preliminary injunction granted by the state court on an ex parte application will be open to review in the federal court after the removal of the cause; that is, the federal court may hear a motion to dissolve or modify the injunction upon notice to the complainant, and the latter should be prepared, in such a case, to support his right to the injunction.[82] But where the application for the dissolution of an injunction previously granted involves a reargument of matters decided by the state court, leave to make the motion must first be applied for and obtained.[83] And the federal court, remembering that it does not sit as an appellate court to review the action taken by the state court, will be slow to reopen questions already judicially passed upon. Thus, where the only ground alleged by the defendant is

[78] Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co., 9 Biss. 133, Fed. Cas. No. 4,665.

[79] Loomis v. Carrington (C. C.) 18 Fed. 97; New Orleans, M. & C. R. Co. v. City of New Orleans (C. C.) 14 Fed. 373.

[80] Allmark v. Platte S. S. Co. (C. C.) 76 Fed. 615.

[81] Bryant v. Thompson (C. C.) 27 Fed. 881.

[82] Coburn v. Cedar Valley Land & Cattle Co. (C. C.) 25 Fed. 791; Carrington v. Florida R. Co., 9 Blatchf. 468, Fed. Cas. No. 2,448; Sharp v. Whiteside (C. C.) 19 Fed. 156.

[83] Carrington v. Florida R. Co., 9 Blatchf. 468, Fed. Cas. No. 2,448.

that the bill filed in the state court was not verified according to law and the practice of the courts of chancery, the federal court will not dissolve the injunction.[84]

The same principle applies to criminal as well as civil cases. Thus, when an indictment, found in a court of a state in which the offense is defined by statute, is removed to a federal court for trial, the latter court must be controlled by the interpretation given to such statute by the highest court of the state.[85]

But in some particulars the administration of justice in the courts of the United States is regulated by federal statutes, irrespective of the laws of the particular state where the court may sit. It is so, for example, as to the competency of witnesses; and on a question of this kind the federal court is bound to follow the act of Congress rather than the laws of the state. Hence the fact that while the cause was pending in the state court, certain witnesses were held by that court to be incompetent under the state law does not preclude them from testifying in the case after its removal to the federal court.[86] Generally speaking, however, questions as to the admissibility of evidence, its relevancy or materiality, or its weight or sufficiency, are governed by the same law in both courts and decisions on points of this kind made by the state court will be accepted by the federal court, after the removal of the cause, and will not be reopened or reviewed.[87]

A somewhat different question is presented where the suit proceeds to trial and judgment in the state court and is carried to the supreme court of the state, where the decision of the lower court is reversed and a new trial ordered, and thereupon the plaintiff, instead of taking his new trial dismisses the suit, and begins an entirely new action against the same defendant and on the same cause of action in a federal court. Here he has plainly a right to introduce

[84] Smith v. Schwed (C. C.) 6 Fed. 455, 2 McCrary, 441.
[85] North Carolina v. Gosnell (C. C.) 74 Fed. 734.
[86] King v. Worthington, 104 U. S. 44, 26 L. Ed. 652.
[87] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Cleaver v. Traders' Ins. Co. (C. C.) 40 Fed. 711.

idence showing a new or different state of facts from that own on the former trial, and which might open entirely w questions for the consideration and determination of e federal court. But if he presents to the latter court ostantially the same state of facts, the court will consider elf bound to accept and follow the decision of the su-eme court of the state on the former appeal.[88]

[88] **Hazard v. Chicago**, B. & Q. R. Co., 1 Biss. 503, Fed. Cas. No. 75; **s. c., 4 Biss.** 453, Fed. Cas. No. 6,276. And see Cleaver v. **ders' Ins. Co.** (C. C.) 40 Fed. 711.

CHAPTER VII

AUTHORITY OF PRECEDENTS AS BETWEEN VARIOUS COURTS OF THE SAME STATE

90. Supreme Court and Inferior Courts.
91. Supreme Court and Intermediate Appellate Courts.
92. Intermediate and Inferior Courts.
93. Chancery Courts.
94. Courts of Co-Ordinate Jurisdiction.
95. General and Special Terms.

SUPREME COURT AND INFERIOR COURTS

90. The decisions of the court of last resort in a state furnish imperative and binding precedents for the guidance of all the courts over which it exercises appellate jurisdiction; and the judges of all the inferior courts are bound to accept and follow such precedents implicitly, without regard to their own previous decisions or their independent views of the law.

In each state, the decisions pronounced by the court of last resort, upon the points in judgment duly presented and passed on, become a part of the law of the state until overruled or otherwise annulled or modified, and the inferior courts of the state are bound thereby; that is, the lower courts are imperatively required to take the law as laid down by the highest appellate court, and to follow its adjudications, wherever applicable, without inquiry into the legal correctness of its views.[1] For instance, if the court

[1] Field v. People ex rel. McClernand, 2 Scam. (Ill.) 79; Town of Scott v. Artman, 237 Ill. 394, 86 N. E. 595; Julian v. Beal, 34 Ind. 371; Leard v. Leard, 30 Ind. 171; Telford v. Barney, 1 G. Greene (Iowa) 575; Bowman v. Board of Chosen Freeholders of Essex County, 73 N. J. Law, 543, 64 Atl. 1010; Rochester & G. V. R. R. v. Clark Nat. Bank, 60 Barb. (N. Y.) 234; Hanford v. Artcher, 4 Hill (N. Y. 271; New York Firemen Ins. Co. v. De Wolf, 2 Cow. (N. Y.) 56 Bier v. Roebling Const. Co., 134 App. Div. 356, 119 N. Y. Supp. 49

ıal appeal in the state has pronounced in favor of or ıst the constitutionality of a state statute, its decision ıding on all the inferior courts of the state, and the ion is no longer an open one for such courts;[2] and if ecision sustained the validity of the statute, an inferior must accept it as a final adjudication of that ques- in its broadest extent, and cannot enter into a fresh ry into the validity of the statute, notwithstanding new tions are urged against it; for it is a presumption of hat all existing reasons that could be presented against tatute were considered by the appellate court and held icient.[3]

r is it permissible for the judge of an inferior court regard a decision of the higher court, fairly applicable e case before him, because it is contrary to his own ous rulings, or because he doubts its correctness, or because he is thoroughly convinced that it was erro- or a mistaken judgment.[4] The Supreme Court of iana, in a very strong opinion upon the absolute duty e inferior courts to accept and follow its decisions ut demur or question, has declared that an inferior is bound by the judgment of the superior court, even ugh its nullity appears upon its face.[5] Further, it is important to observe that the controlling force of a

v. King, 51 App. Div. 619, 64 N. Y. Supp. 626; Lewis v. Long R. Co., 31 Misc. Rep. 546, 65 N. Y. Supp. 595; Cincinnati ht & Coke Co. v. Bowman, 1 Handy (Ohio) 289; Vattier v. Ches- 1 Ohio Dec. 127; Johnson v. Seattle Electric Co., 39 Wash. 1 Pac. 705; Attorney General ex rel. Cushing v. Lum, 2 Wis.

lmer v. Lawrence, 5 N. Y. 389; Wheeler v. Rice, 4 Brewst. 29; Pacific Coast S. S. Co. v. United States, 42 Ct. Cl. 228. mmonwealth v. Geesey, 1 Pa. Super. Ct. 502.

ople v. McGuire, 45 Cal. 56; Costello v. Syracuse, B. & N. Y. , 65 Barb. (N. Y.) 92; Barr v. Poor, 28 Ohio Cir. Ct. R. 257.

ccession of Martin v. Succession of Hoggatt, 37 La. Ann. 340. a later case it was said that an appellate court has no power ppel an inferior court to be governed by a decision of the ap- court in a previous case, on an appeal from such inferior State ex rel. Wood v. Judge of Fourth City Court, 38 La. 21.

decision of the court of last resort is not limited to th particular litigation in which it was given. Its authorit does not rest upon the principle of res judicata, and there fore it is to be applied by the lower courts to any case sub sequently arising in which the facts are substantially th same, although the parties may be entirely different.[6] Th opinion of the appellate court may contain a mandate t the lower court, as, that a new trial shall be granted, tha the decree shall be modified in specified particulars, tha the prisoner shall be discharged, etc. And this, of course must be implicitly obeyed. But besides this the opinion unless concerned with questions of fact entirely or wit questions upon evidence, will enunciate some general rul or principle of law. And it is this rule or principle whic constitutes the precedent, and which the inferior courts ar imperatively bound to follow thereafter, in all similar cases until it shall have been overruled or modified, or counter acted by a statute. These matters were very clearly ex plained in an early opinion of the Supreme Court of Wis consin, in which it was said: "It is contended that the opin ions pronounced by the Supreme Court are not of bindin authority upon the Circuit Court, and it is intimated tha though inferior courts may treat such opinions never s contemptuously, yet the mere remittitur, certified and trans mitted by our clerk, is the only authoritative direction t the court below. This is not the correct view of the law It is not intended to be declared that all the reasoning an instances of illustration introduced into an opinion of thi court are to be adopted by inferior tribunals from whic cases or matters may come here, by appeal, writ of erro or otherwise; but it is insisted and declared that the opin ion of this court upon the points in judgment, presente and passed upon in cases brought here for adjudication, i the law of the land until overruled or otherwise annulled and that inferior courts and tribunals must yield obedienc to the law thus declared." [7]

[6] Bigelow v. Tilden, 52 App. Div. 390, 65 N. Y. Supp. 140.
[7] Attorney General ex rel. Cushing v. Lum, 2 Wis. 514.

As to matters of procedure in the trial courts, it has been stated that whatever is said by the supreme judicial tribunal should be followed in the lower courts as a judicial direction, though stated only in an advisory way.[8] But while the inferior courts are thus bound to follow implicitly any rule laid down in an opinion of the higher court, still it is sometimes necessary for them to construe or interpret such an opinion, comparing its general statements with the particular facts of the case, in order to determine exactly the extent of its authority as a precedent. This process should not be resorted to for the purpose of evading or distinguishing away a pertinent decision; but a trial court has a right, when following a decision of the supreme court and adopting its language, to add such consistent explanations as may be proper to adapt it to the facts of the case under consideration.[9]

When the court of last resort departs from its own previous rulings, making conflicting decisions, so as to leave it uncertain what are its real and final views on a given question of law, it is the duty of the court below to give effect to the latest opinion of the higher court, leaving it to that tribunal to determine finally whether it will abide by its earlier or its later decisions.[10] But where, on the trial of a case, and in deciding a question concerning the admissibility of certain testimony, the judge rules in accordance with an opinion of the supreme court which has never been overruled, though it has been subjected to criticism and doubt, his action will not be considered reversible error.[11]

In states where, either permanently or temporarily, the supreme judicial court is aided in its labors by commissioners of the court, or commissioners of appeal, their decisions have exactly the same binding effect upon the inferior courts as those of the supreme court itself, provided

[8] Mauch v. City of Hartford, 112 Wis. 40, 87 N. W. 816.

[9] Freeman v. Weeks, 48 Mich. 255, 12 N. W. 215.

[10] Costello v. Syracuse, B. & N. Y. R. Co., 65 Barb. (N. Y.) 92; Schwarcz v. International Ladies' Garment Workers' Union, 68 Misc. Rep. 528, 124 N. Y. Supp. 968.

[11] State v. Blake, 25 Me. 350.

they have been adopted by the court or at least not disapproved.[12] But where the court itself renders a decision inconsistent with a previous opinion of the commissioners, the latter ceases to be an authority, and the lower courts are bound to follow the supreme court and not the commissioners.[13]

It is perhaps scarcely necessary to remark, except that it has been made the subject of judicial decision, that a court of last resort is never bound, under any circumstances, to adopt or follow the decisions of the inferior courts,[14] although the former course is often pursued when the opinions of the lower courts meet the entire approval of the appellate judges, and the latter course is sometimes adopted for the sake of preserving a rule of property and to avoid unsettling titles or important private interests.

There is one possible exception to the main rule above stated. This occurs where the decisions of the highest court of the state on any given question are in conflict with those of the Supreme Court of the United States. Here it is generally considered to be the duty of an inferior court of the state to follow the rulings of the supreme federal tribunal if the question at issue is one arising under the constitution or laws of the United States, or, in other words, is a "federal question"; but as to all other matters it is bound by the adjudications of its own appellate tribunal, and the latter must also be preferred to the decisions of any inferior or intermediate court of the federal system.[15]

[12] Wooters v. Hollingsworth, 58 Tex. 371; Randall v. National Building, Loan & Protective Union of Minneapolis, 43 Neb. 876, 62 N. W. 252.

[13] Mechanics' & Traders' Bank of Jersey City v. Dakin, 8 Hun (N. Y.) 431.

[14] Gibson v. People, 44 Colo. 600, 99 Pac. 333.

[15] See Grant v. Cananea Consol. Copper Co., 117 App. Div. 576, 102 N. Y. Supp. 642; Delaware & H. Canal Co. v. Commonwealth (Pa.) 17 Atl. 175, 1 L. R. A. 232; Town of Venice v. Breed, 65 Barb. (N. Y.) 597. Compare Commonwealth v. Monongahela Nav. Co., 2 Pears. (Pa.) 372; Poole v. Kermit, 37 N. Y. Super. Ct. 114; Rogers Park Water Co. v. City of Chicago, 131 Ill. App. 35. See infra, p. 374.

SUPREME COURT AND INTERMEDIATE APPELLATE COURTS

91. It is the duty of an intermediate appellate court of a state to accept and follow the rulings of the court of last resort in the state, whenever applicable precedents are found, without a re-examination of the questions involved, and, if necessary, to overrule its own previous decisions to the contrary.

Intermediate courts, between the court of last resort and the courts of general original jurisdiction, have been created in several states, in recent times, to relieve the courts of final appeal from a portion of the burden of their constantly increasing labors. These courts are generally invested with appellate jurisdiction only, and that jurisdiction is limited to cases not involving more than a certain amount in money, or not involving capital punishment, or not involving questions relating to the constitutionality of statutes, or it may be otherwise restricted, the statutory provisions in this respect not being uniform. These intermediate courts, although they have revisory jurisdiction over the courts of first instance, within the limits marked out, and are entitled to set precedents for them, are still subordinate to the court of last resort, and are imperatively required to be guided in their own decisions by the rulings made by that court, whenever a decision is presented to their notice which fairly rules the case on trial. When this occurs, the intermediate court must not enter upon a fresh examination of the question of law involved, but must take the rule as laid down by the court of final appeal, whatever may be its own views of the correctness of that rule, and whatever may have been the course of its own previous decisions on the same point. This principle is fully recognized by these courts, and has been repeatedly declared by them. Thus, the Court of Appeal in California declares itself to be imperatively

bound to follow a decision of the Supreme Court of that state which has not been overruled or modified.[16] So in Delaware, the Superior Court is bound by a decision of the Court of Errors and Appeals, though it conflicts with one of its own former decisions.[17] In Georgia, while the Court of Appeals is a court of final review, yet the decisions of the Supreme Court are binding upon it, whatever may be its own views of the question in hand.[18] In Illinois, the Appellate Court can neither overrule nor disregard a decision of the Supreme Court, but is bound to follow it.[19] In Indiana, the Appellate Court is bound by the law as declared by the Supreme Court, and its decisions must conform thereto, unless (as provided by statute) it should be of the opinion that the law was wrongly declared, but in the latter event, if two of the judges of the Appellate Court agree in the opinion that a ruling precedent of the Supreme Court is erroneous, the case, with a written statement of the reasons for such opinion, shall be transferred to the Supreme Court for decision; but the intermediate court has no authority simply to overrule or set aside a decision of the court of last resort.[20] A similar rule, as to the duty of the intermediate court to accept and follow the decisions of the highest court of the state, pre-

[16] Canadian Bank of Commerce v. Leale, 14 Cal. App. 307, 111 Pac. 759.

[17] State v. Green, 1 Pennewill (Del.) 63, 39 Atl. 590.

[18] Minor v. City of Atlanta, 7 Ga. App. 817, 68 S. E. 314.

[19] Heffron v. Concordia Fire Ins. Co., 138 Ill. App. 483; Chicago & J. Electric Ry. Co. v. Freeman, 125 Ill. App. 318. The statute authorizing the Appellate Court to make a finding of fact, and declaring such finding to be binding on the Supreme Court, is not unconstitutional. Earnshaw v. Western Stone Co., 200 Ill. 220, 65 N. E. 661.

[20] Wagner v. Carskadon, 28 Ind. App. 573, 61 N. E. 976; Richey v. Cleveland, C., C. & St. L. R. Co., 93 N. E. 1022; State Life Ins. Co. v. Jones, 92 N. E. 879; Studebaker v. Alexander, 91 N. E. 606; Caywood v. Supreme Lodge Knights & Ladies of Honor, 41 Ind. App. 639, 84 N. E. 782; Willard v. Albertson, 23 Ind. App. 166, 53 N. E. 1078; Kelley v. City of Crawfordsville, 14 Ind. App. 81, 42 N. E. 491.

vails in Kansas,[21] in Kentucky,[22] and in Missouri.[23] In New York, the Appellate Division of the Supreme Court occupies much the same position as the intermediate courts of other states, and while it possesses important revisory jurisdiction over the lower courts, still it is subordinate to the Court of Appeals, and is imperatively bound to accept the law as laid down by the latter court.[24] In Texas, the Court of Civil Appeals is bound to follow the decisions of the Supreme Court, though it may consider them unsound or contrary to the weight of authority, and if a decision of the Supreme Court conflicts with one of its own previous rulings, such ruling must be considered as reversed or overruled.[25] But in this state we find the unique

[21] Missouri, K. & T. Ry. Co. v. Steinberger, 6 Kan. App. 585, 51 Pac. 623.

[22] Russell's Adm'r v. Russell's Guardian, 14 Ky. Law Rep. 236; Glover's Guardian v. Common School Dist., 14 Ky. Law Rep. 240.

[23] Henderson v. Terminal R. Ass'n of St. Louis, 154 Mo. App. 174, 133 S. W. 151; Sheets v. Mississippi River & Bonne Terre Ry., 152 Mo. App. 376, 133 S. W. 124; Chuse Engine & Mfg. Co. v. Vromania Apartment Co., 154 Mo. App. 139, 133 S. W. 624; McElvain v. St. Louis & S. F. R. Co., 151 Mo. App. 126, 131 S. W. 736; Cushing v. Richardson, 143 Mo. App. 608, 128 S. W. 805; Shipley v. Metropolitan St. R. Co., 144 Mo. App. 7, 128 S. W. 768; Atwater v. A. G. Edwards Brokerage Co., 147 Mo. App. 436, 126 S. W. 823; Barr v. Lake, 147 Mo. App. 252, 126 S. W. 755; Crockett v. St. Louis & H. R. Co., 147 Mo. App. 347, 126 S. W. 243; Jackson v. Smith, 139 Mo. App. 691, 123 S. W. 1026; Martin v. Bennett, 139 Mo. App. 237, 122 S. W. 779; O'Day v. Sanford, 138 Mo. App. 343, 122 S. W. 3; Western Roofing Co. v. South Park Baptist Church, 137 Mo. App. 101, 119 S. W. 495; Rutledge v. Rutledge (Mo. App.) 119 S. W. 489; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435; Fowles v. Bentley, 135 Mo. App. 417, 115 S. W. 1090; Dickey v. Orr, 132 Mo. App. 416, 111 S. W. 910; Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938; Schafer v. St. Louis & H. Ry. Co., 76 Mo. App. 131; White v. Wabash Western Ry. Co., 34 Mo. App. 57; Sage v. Reeves, 17 Mo. App. 210.

[24] Smith v. Lehigh Valley R. Co., 77 App. Div. 43, 79 N. Y. Supp. 106; Scott v. King, 51 App. Div. 619, 64 N. Y. Supp. 626.

[25] Ennis Waterworks v. City of Ennis, 136 S. W. 513; Rabb v. La Feria Mutual Canal Co., 130 S. W. 916; Missouri, K. & T. R. Co. of Texas v. Graves, 122 S. W. 458; St. Louis Southwestern R. Co. of Texas v. Holt, 121 S. W. 581; Missouri, K. & T. R. Co. of Texas v. Williams, 120 S. W. 553; Atchison, T. & S. F. R. Co. v.

institution of a Court of Criminal Appeals, which has final jurisdiction over all cases coming before it, exclusive of the Supreme Court of the state, and which is therefore the highest tribunal in Texas for cases pertaining to the enforcement of the criminal law. Its decisions are imperatively binding on the Court of Civil Appeals and must be followed by the latter court.[26] But the constitution has provided no means by which a conflict in the rulings of the Supreme Court and the Court of Criminal Appeals can be determined or reconciled, and consequently neither of these courts considers itself bound to follow the decisions of the other, and it occasionally happens that there are contrary rulings on the same question of law by the two courts of final authority in this state.[27]

As to all these intermediate appellate courts, it may be remarked that, if they find various conflicting and irreconcilable rulings of the supreme court on the same point of law, it is their duty to follow the latest rulings of that court, disregarding the earlier decisions.[28] Where an intermediate court has rendered its decision in a case, and thereafter the supreme court lays down a different rule of law as applicable to the same state of facts occurring in another case, and the first case again comes before the intermediate court, as, on rehearing, it is the duty of the latter court to overrule its former decision and render judgment in accordance with the doctrine of the supreme court.[29] It should also be noticed that the precedents set by the intermediate courts are not at all binding on the

Pickens, 118 S. W. 1133; Bean v. Bird, 117 S. W. 177; Williams v Keith, 112 S. W. 948; Ft. Worth & D. C. R. Co. v. State, 88 S. W 370; Jones v. Gulf, C. & S. F. R. Co., 23 S. W. 186.

[26] Robinson v. City of Galveston, 111 S. W. 1076.

[27] May v. Finley, 91 Tex. 352, 43 S. W. 257; Griffin v. Tucker 102 Tex. 420, 118 S. W. 635.

[28] Martin v. City of St. Joseph, 136 Mo. App. 316, 117 S. W. 94 Jones v. Horn, 104 Mo. App. 705, 78 S. W. 638; Becker v. Schutte 85 Mo. App. 57; Seaboard Nat. Bank of New York v. Woesten, 7 Mo. App. 155.

[29] Hamilton v. Aurora Fire & Marine Ins. Co., 35 Mo. App. 263 Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. Supp. 930.

supreme court, which is under no obligation to follow them.[80] But decisions rendered by an intermediate or even an inferior court, during a period when there was no constitutional or statutory provision for a review of its judgments by the supreme court, will be treated with greater respect, since, being of final authority at the time, they must be considered as having entered into the law of the state, and perhaps as having formed the basis of contracts or titles. Such decisions will not be overruled by the court of last resort in subsequent cases, unless it is satisfied that they are clearly erroneous.[81]

INTERMEDIATE AND INFERIOR COURTS

92. The inferior courts of a state will follow the decisions of the intermediate appellate courts until the court of last resort shall either reverse them or announce a contrary doctrine; and if there are several such intermediate courts in the state, and their decisions upon the same question of law are in conflict, an inferior court will follow the rulings of the appellate court in the same district, division, or department where it sits.

Since an intermediate court of the kind here spoken of exercises a revisory jurisdiction over the lower courts of the state, it is plainly the duty of the latter to follow the rulings and decisions of the former, provided they are plainly and fully applicable to the case on trial,[82] without attempting to disregard or evade them. But these decisions of the intermediate courts are still subject to reversal by the court of last resort, or to be deprived of authorita-

[80] Paddock v. Missouri Pac. Ry. Co., 155 Mo. 524, 56 S. W. 453; City of Sedalia, to Use of Sedalia Nat. Bank, v. Donohue, 190 Mo. 407, 89 S. W. 386.

[81] Daniels v. State, 2 Pennewill (Del.) 586, 48 Atl. 196, 54 L. R. A. 286.

[82] Wellbrock v. Long Island R. Co., 31 Misc. Rep. 424, 65 N. Y. Supp. 592.

tive force by the announcement of a contrary rule. Whe this happens, they are of course no longer of controllin force in the lower courts; but unless and until they ar thus discredited by the highest court, they are to be fol lowed implicitly.[33] A similar rule prevails in England It is there held that where a colonial legislature has passe an act in the same terms as an imperial statute, and th latter has been authoritatively construed by the Court o Appeal in England, the same construction should b adopted by the courts of the colony. "It is the judgmen of the Court of Appeal, by which all the courts in Englan are bound, until a contrary determination has been ar rived at by the House of Lords."[34] But if there are sev eral intermediate appellate courts in the state, or if such court is divided into several branches or departments, i will sometimes happen that these different courts o branches will put forth conflicting rulings on the sam point of law. The establishment of the right rule and th rejection of the erroneous one is for the final decision o the court of last resort. But until it has spoken, it is th duty of an inferior court to follow the decision of the in termediate court in its own department or district of th state. Thus, in New York, the Special Term of the Su preme Court will be bound to follow the decision of th Appellate Division in the same department, where there i a conflict between such decision and a decision of the Ap pellate Division of another department.[35]

[33] Cleveland, C., C. & St. L. R. Co. v. Schneider, 40 Ind. App. 52 82 N. E. 538; Flaucher v. City of Camden, 56 N. J. Law, 244, 28 At 82; Johannessen v. Johannessen, 70 Misc. Rep. 361, 128 N. Y. Sup 892; Ellenbogen v. Hantman (City Ct. N. Y.) 126 N. Y. Supp. 164 William Fox Amusement Co. v. McClellan, 62 Misc. Rep. 100, 11 N. Y. Supp. 594; Bussing v. City of Mt. Vernon, 121 App. Div. 50 106 N. Y. Supp. 195; Western Nat. Bank v. Faber, 29 Misc. Re 467, 62 N. Y. Supp. 82; People v. American Loan & Trust Co., Misc. Rep. 647, 80 N. Y. Supp. 627.

[34] Trimble v. Hill, L. R. 5 App. Cas. 342.

[35] Maass v. Rosenthal, 62 Misc. Rep. 350, 115 N. Y. Supp. 4.

CHANCERY COURTS

93. In states where separate courts of chancery exist, which are subject to the appellate jurisdiction of the court of last resort, they are bound to follow the decisions of that court, wherever they may be applicable, though made in actions arising at common law.

In several of the states, courts of chancery still exist, which are separate and apart from the courts of law, and which are occupied exclusively with the administration of justice in cases of a purely equitable nature. But their judgments are generally, if not invariably, subject to review by the supreme court or other court of last resort in the state. And chancery courts are not exempt from the operation of the rule of stare decisis. However wide may be the judicial discretion of a chancellor, it remains true, as we have stated on an earlier page, that the courts of equity yield an adherence to the doctrine of precedents no less steady and consistent than that shown by the courts of common law.[36] Hence it may be regarded as a fixed rule that a court of chancery will feel imperatively constrained to accept and follow the rulings and decisions of the court of last resort in the state, in all cases where they shall be found applicable, and without regard to whether the case in which the particular rule or principle was announced was a case of equitable cognizance or one arising under the common law or a statute.[37]

[36] Supra, p. 30.

[37] Ballou v. United States Flour Milling Co., 67 N. J. Eq. 188, 59 Atl. 331; Hodge v. United States Steel Corp., 64 N. J. Eq. 90, 53 Atl. 601; French v. City of Camden, 77 N. J. Eq. 151, 76 Atl. 980; Hawley v. James, 7 Paige (N. Y.) 213, 32 Am. Dec. 623; Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320; McElwee v. McElwee, 97 Tenn. 649, 37 S. W. 560; Rush v. Moore (Tenn. Ch. App.) 48 S. W. 90; Hambough v. Carney (Tenn. Ch. App.) 62 S. W. 503; Enright v. Amsden, 70 Vt. 183, 40 Atl. 37.

COURTS OF CO-ORDINATE JURISDICTION

94. Decisions of inferior courts are not imperatively bin ing upon courts of equal rank and co-ordinate ju isdiction, but may be respected for their reasonin and may be followed for the sake of uniformity.

When a point has not been decided by the court of la resort in the state, but there are decisions upon it made b inferior courts of equal authority, such as the circuit district or county courts of the state, or by co-ordina branches of the same court in different districts, and e pecially when two or more of these decisions concur upo the point in question, it is proper, for the sake of securin uniformity of decision, that they should be recognized precedents and respected as such by the other courts equal rank, until reversed by a higher authority.[38] An it is the general rule and practice that a question of la settled by the decision of one of two co-ordinate courts wi not be reviewed by the other in the same litigation, or i any suit based on the same facts or events.[39] But when court of first instance is called upon to decide a questio which has not yet been passed upon by the highest cou of the state, so that the judge is entirely free to form an express his own opinion, it may be difficult to deci whether he should be more strongly influenced by a d cision previously rendered by a domestic court of equ rank with his own, or by authorities from other state which, though destitute of controlling force, may posse

[38] Andrews v. Wallace, 29 Barb. (N. Y.) 350; Bentley v. Goodwi 38 Barb. (N. Y.) 633; Reed v. Atlantic & P. R. Co. (C. C.) 21 Fe 283; Hardenburgh v. Crary, 50 Barb. (N. Y.) 32; Sheridan v. Tucke 145 App. Div. 145, 129 N. Y. Supp. 18; State v. Fosdick, 1 Ohio C Ct. R. 265; State v. Schwarz (Tex.) 124 S. W. 420; Pledge v. Ca [1895] 1 Ch. 51.

[39] People ex rel. Metz v. Dayton, 120 App. Div. 814, 105 N. Y. Sup 809; Railton v. People, 85 Ill. App. 384; Carlisle v. Gibbs (Te Civ. App.) 123 S. W. 216. And see Miller v. Hulbert, 6 Wkly. La Bul. (Ohio) 412.

high persuasive value. It has been said that, in this case, the court should prefer the domestic authority.[40] And this may very well be the case where the question involved is essentially local in its character or depends on the construction of a statute. But in matters of a more general nature, there seems to be no sufficient reason for following a precedent of this kind, if the judge entertains any doubt of its correctness, in the face of a strong and unanimous current of authorities in other states.

But whatever deference may be paid to the decisions of a court of co-ordinate jurisdiction, one court of such a character has no control over the decisions of another. The mere fact that a decision has been heretofore rendered by a court of equal rank with that which is trying the case does not preclude the latter from deciding the issue upon its own views of the law, if satisfied that the former ruling was erroneous.[41] For instance, in a case in the court of Queen's Bench, Lord Chief Justice Campbell is reported to have said: "We have been pressed with the authority of Drew v. Collins, 6 Exch. 670. To that authority we have paid the most sincere respect; but after a very careful examination, we are not able to assent to the reasoning on which it rests. As it is only the decision of a court of co-ordinate jurisdiction, we do not consider ourselves bound by it; and we have the less reluctance to decide according to our own opinion, as, the question being upon the record, it may be carried to the Exchequer Chamber and the House of Lords." [42] Especially is one court free from any obligation to follow the decision of a court of co-ordinate jurisdiction when the latter, in making the

[40] Head v. Smith, 44 How. Prac. (N. Y.) 476.

[41] Northern Pac. R. Co. v. Sanders (C. C.) 47 Fed. 604; Illinois Cent. R. Co. v. Hecker, 129 Ill. App. 375; Ford v. Babcock, 2 Sandf. (N. Y.) 518; Reynolds v. Davis, 5 Sandf. (N. Y.) 267; In re City of New York, 114 App. Div. 519, 100 N. Y. Supp. 140; Nichols v. Fanning, 20 Misc. Rep. 73, 45 N. Y. Supp. 409; In re McDonald's Estate, 4 Ohio Dec. 396; Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land Mortgage Co., 16 Tex. Civ. App. 520, 42 S. W. 864.

[42] Tetley v. Taylor, 1 El. & Bl. 521.

particular decision, was acting in a case over which it ha
no rightful jurisdiction,[43] or when the judgment was en
tered pro forma, without any argument or real considera
tion of the question of law involved, and merely for th
purpose of hastening a determination of the matter by th
appellate court.[44]

The opinion has also been advanced that, where a ques
tion has been fully considered and deliberately determine
by one of the lower courts, and other co-ordinate courts o
the same system have made decisions in conflict therewitl
it is better that the decision should be adhered to in th
court which made it, until the court of last resort shall hav
passed upon the same question.[45] And indeed it may b
conceded that a court should not be expected to overrul
its own decisions merely in view of the fact of contrar
decisions having been made by another court which ha
no appellate jurisdiction over the first.

GENERAL AND SPECIAL TERMS

95. In the case of a court holding general and specia terms, the latter being for the trial of causes, an the former in the nature of sittings in bank, judge holding a special term is bound to follo a decision rendered by the general term, though i another district.

The foregoing rule, though admitted by the practicall
unanimous voice of the authorities, is considered as sub
ject to the exception that a judgment of the general ter
is not necessarily to be followed where it was clearly mad
through some mistake, or where it is unquestionably e

[43] Lockwood v. Carr, 4 Dem. Sur. (N. Y.) 515.

[44] In re McGinness' Estate, 13 Misc. Rep. 714, 35 N. Y. Supp. 82

[45] Greenbaum v. Stein, 2 Daly (N. Y.) 223; Jones v. New York
E. R. Co., 29 Barb. (N. Y.) 633; Charles v. Arthur (Sup.) 84 N.
Supp. 284.

roneous as a matter of law.[46] And it is said that where the question relates to the status of a statute which is involved in a maze of legislation, the same weight cannot be given to a decision of the general term as would be accorded to one involving a pure legal principle; and in such a case, where it is clear to the special term that statutory provisions have been overlooked, it will follow its own clear convictions, and leave the general term to review the subject.[47] Generally, however, it is the rule and not the exception which prevails. Thus, a decision of the general term construing a will, though not res judicata in a subsequent action between other parties involving the construction of the same will, is an expression of opinion which the special term will follow.[48] And a single judge, holding a special term of the court, is not at liberty to depart from or overrule a decision made by the court in bank or at general term, notwithstanding that he thinks it erroneous and has always disapproved of it.[49] Thus, in Pennsylvania, a case concerning the validity of an act for the erection of public buildings was heard by all the judges of the supreme court sitting at nisi prius, and the statute was adjudged constitutional. And it was held that a single judge of that court would not thereafter entertain a bill for an injunction, based upon the alleged unconstitutionality of the act, since he was bound by the former judgment, and bound to presume that all the considerations bearing on the question of constitutionality which could have been brought before the court were then considered and decided.[50] It should also be noted that if there are inferior tribunals to that which holds the general term, its decision made at such term is conclusive and binding

[46] Loring v. United States Vulcanized Gutta Percha Belting & Packing Co., 30 Barb. (N. Y.) 644; Malan v. Simpson, 20 How. Prac. (N. Y.) 488; Bentley v. Goodwin, 38 Barb. (N. Y.) 633.

[47] Overheiser v. Morehouse, 16 Abb. N. C. (N. Y.) 208.

[48] United States Trust Co. v. Black, 9 Misc. Rep. 653, 30 N. Y. Supp. 453.

[49] Adams v. Bush, 2 Abb. Prac., N. S. (N. Y.) 118.

[50] Wheeler v. Rice, 4 Brewst. (Pa.) 129; Id., 8 Phila. 115.

upon them, until overruled by the same court or reverse by a higher appellate court, as also upon referees and com missioners.[51] And two successive decisions of genera terms concurring on the same point, in different parts o the state, should be treated by the same and all inferio courts as binding authority, unless and until reversed b a higher tribunal.[52]

[51] Burt v. Powis, 16 How. Prac. (N. Y.) 289.
[52] Andrews v. Wallace, 29 Barb. (N. Y.) 350.

CHAPTER VIII

AUTHORITY OF PRECEDENTS AS BETWEEN THE VARIOUS COURTS OF THE UNITED STATES

96. Decisions of Supreme Court.
97. Decisions of Inferior Courts as Precedents in Supreme Court.
98. Construction of State Statutes.
99. Comity Between Co-Ordinate Courts.
100. Special Rule in Patent Cases.
101. Special Rule as to Tariff Cases.
102. Circuit Court of Appeals and Inferior Courts of Same Circuit.
103. Circuit Court of Appeals and Inferior Courts in Other Circuits.
104. As Between Different Judges in Same Court.

DECISIONS OF SUPREME COURT

96. The decisions of the Supreme Court of the United States are absolutely and imperatively binding as precedents in similar cases in all the inferior courts of the federal system.

The General Rule

When the Supreme Court of the United States has once decided a question of law or laid down the rule applicable to a given state of facts, its adjudication becomes a precedent for the decision of all similar cases, in all other courts of the federal judicial system, which not only may with propriety be followed, but which absolutely must be accepted as correct and final.[1] The proper attitude of a subordinate federal judge towards a decision of the court of last resort, though contrary to his own judicial opinion, was finely expressed by the late Mr. Justice Brewer, then

[1] Wright v. Columbus, H. V. & A. R. Co., 176 U. S. 481, 20 Sup. Ct. 398, 44 L. Ed. 554; Angle v. Chicago, P. & S. Ry. Co. (C. C.) 95 Fed. 214; Crooks v. Stuart (C. C.) 7 Fed. 800; Southern Pac. Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350; Hollister v. United States, 145 Fed. 773, 76 C. C. A. 337; Mella v. Northern S. S. Co. (C. C.) 162 Fed. 499; Carson v. Southern Ry. Co., 68 S. C. 55, 46 S. E. 525.

a circuit judge, in the following terms: "The opinion file in that case by the Supreme Court is earnestly criticised by the learned counsel for plaintiff, and several pages of thei brief are devoted to this criticism. Although such opinio was different from my own, and resulted in the reversal o my judgment, it does not become me to criticise it in th least. On the other hand it is my duty as a judge of subordinate court loyally to accept it in all its parts as correct interpretation of the law. If it be true, as counse say, that there are errors of fact and of law in it, that court when its attention is called to the matter, will undoubtedl make the correction. Meantime it is my duty to follow i both in letter and spirit." [2]

What Courts are Bound

The rule just stated is applicable to all the courts or ganized by the acts of Congress as a part of the federa judicial system, and over whose judgments the Suprem Court exercises a revisory jurisdiction by appeal or erro Hence the decisions of the court of last resort are bindin precedents not only in the district and (former) circui courts of the United States, but also in the circuit court of appeals, so that, when the Supreme Court has finall decided a particular question arising under an act of Con gress, a circuit court of appeals will not certify the sam question to the Supreme Court for its instructions.[3] More over the rule applies to the Court of Claims,[4] and to th supreme court and court of appeals of the District o Columbia,[5] which, while they are not strictly speaking part of the system of "courts of the United States," ar not simply local courts either, and are subject to a con siderable extent to the revisory jurisdiction of the Suprem Court.

[2] United States v. Missouri, K. & T. R. Co. (C. C.) 37 Fed. 6 Brewer, J.

[3] Lau Ow Bew v. United States, 47 Fed. 641, 1 C. C. A. 1.

[4] William Cramp & Sons Co. v. United States, 43 Ct. Cl. 202.

[5] Goodyear Dental Vulcanite Co. v. Brightwell, MacArthur & M (D. C.) 74.

What Questions Concluded

A decision of the supreme federal tribunal, for or against the validity of an act of Congress, or for or against the validity of a state law in regard to its conformity to the federal constitution or federal laws, is binding and conclusive, unless and until it is overruled by the same tribunal, on all inferior courts of every grade, including the national courts as well as those of the states.[6] But outside of the domain of constitutional law, and in respect to questions of general jurisprudence, commercial law, the common law, the rules and principles of equity, and other like topics, the judgments of the Supreme Court of the United States have a different effect in the inferior federal courts from that which is accorded to them in the state courts. In matters of this kind, the chief courts of the various states claim the right to exercise their independent judgment, and while they do habitually pay the greatest deference and respect to the pronouncements of that eminent court, and incline to an accordance with them wherever it is possible, still they do not recognize them as binding precedents, but only as persuasive—highly persuasive—evidence of what is the law.[7] But no such distinction is or can be made in the inferior federal courts. Not only on questions of constitutional law, but also in respect to matters of general, common, or commercial law, equity jurisprudence, and practice and procedure, they are bound to follow implicitly the adjudications of the Supreme Court.[8]

Conflicting Authority Elsewhere

With respect to their duty to follow the explicit adjudications of the Supreme Court, the inferior courts are not to be at all concerned with the fact that there may be con-

[6] Snead v. Central of Georgia R. Co. (C. C.) 151 Fed. 608.

[7] See infra, chapter IX.

[8] Crooks v. Stuart (C. C.) 7 Fed. 800 (questions of general jurisprudence); Southern Pac. Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350 (measure of care required of a common carrier); Hollister v. United States, 145 Fed. 773, 76 C. C. A. 337 (whether a writ of scire facias on a forfeited recognizance is the commencement of a new action).

flicting or contradictory authorities elsewhere. These ar not to be weighed nor taken into account at all. In such a case, a subordinate federal court is neither required no permitted to conform its decision to what is termed th "preponderance of authority" or the "general current o authority." Hence, having before it a judgment of the Su preme Court in a similar case, the lower federal court i under the plain duty and obligation to follow and appl it, irrespective of the fact that such decision may "not b in line with the current of authority in other jurisdic tions," [9] or although the result may be directly contrar to the doctrine on the same subject held by the courts o the state in which the federal court is sitting.[10] This ap plies not only to matters of constitutional law and statu tory construction, but also to those numerous question of general law which are yet unsettled, or are variousl ruled in different jurisdictions. Thus, for example, on th question whether the grantee in a quit-claim deed could de fend as a bona fide purchaser without notice, a federal cir cuit court once remarked: "This question has been ad judicated by the courts of the several states so as to leav a distressing conflict of authority; but the Supreme Cour of the United States has settled the rule for our guidanc here." [11]

Dicta and Conflicting Decisions

It is not in general very safe for an inferior court t construe as mere dictum any expressions of opinion in th decisions of its superior court. And even in the case of a observation which plainly was made obiter or extrajudicia ly, it is well for the lower courts to notice it carefull and observe its tendency, especially when it tends strongl to indicate the decision which the appellate court may b expected to make in the future, when the particular fact on which the dictum was predicated shall be present in case before it. In a case not precluded by any direct pre

[9] Well v. Alabama State Land Co. (C. C.) 175 Fed. 252.

[10] Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 26 Su Ct. 252, 50 L. Ed. 477.

[11] Woodward v. Jewell (C. C.) 25 Fed. 689.

edent, such hints or indications of the probable future judgment of the court of last resort may often serve to guide the trial judge into the path which will issue in the affirmance of his judgment, or they may lend a satisfying support to his own existing judicial opinion. At the same time, it must always be remembered that a decision, considered as a precedent, is to be limited to the questions actually in issue and necessary for the determination of the controversy. Hence, while declarations of law bearing on issues and indicating the proper judgment thereon, by the United States Supreme Court, are binding on the lower federal courts, opinions as to the law on facts different from those in issue are not controlling.[12] But essential determinations may be implicit in a judgment as well as explicit. To illustrate, a decision by the Supreme Court of the United States affirming a decision of a state court, which upheld a state statute of limitations, the constitutional validity of which was dependent upon the existence of some precedent or coincident remedy, must be regarded as expressly deciding that such remedy exists, and cannot be disregarded as a precedent in a later case in a lower federal court (or on writ of error thereto), on the theory that the existence of such remedy was merely assumed by the Supreme Court of the United States, because it was bound in that particular to follow the decision of the state court, but is not so bound in a case arising in a federal court.[13] Where two cases in the Supreme Court appear to be in irreconcilable conflict as to the right of a complainant to maintain his bill in certain circumstances, the trial court will sustain a demurrer to the bill, in order to obtain a speedy determination of such right.[14]

[12] United States v. Illinois Cent. R. Co., 170 Fed. 542, 95 C. C. A. 628.

[13] Saranac Land & Timber Co. v. Roberts, 177 U. S. 318, 20 Sup. Ct. 642, 44 L. Ed. 786.

[14] Graver v. Faurot (C. C.) 64 Fed. 241.

DECISIONS OF INFERIOR COURTS AS PRECEDENTS IN SUPREME COURT

97. The Supreme Court of the United States is not bound to regard any decision of an inferior federal court as a precedent for its own action; but under exceptional circumstances, and on grounds of public policy or expediency, it may decline to reverse a rule established by the decisions of the inferior courts and generally accepted and acted on.

In view of its paramount appellate jurisdiction, it is of course impossible to conceive that the Supreme Court of the United States should ever consider itself legally bound to follow as a precedent any decision of any of the inferior courts of the federal system, whether rendered in the case at bar or in other similar cases. Yet, just as the supreme courts of the states will sometimes refer with approbation to decisions made at nisi prius, so the supreme federal tribunal may occasionally cite rulings made by learned judges in the circuit or other courts, as showing a general concurrence in the opinion of the law which it is at the time announcing, or the general understanding of the profession on the particular question, or simply in support of its reasoning or conclusions. And there are exceptional cases as above stated, in which it will accept as correct a decision made by one of the inferior courts, and decline to change the rule so established, even though it might strongly incline to make a different determination in a case of first impression. This happens where a change in the rule would work great and general hardship, unsettle business conditions, or conflict with sound principles of public policy or important considerations of expediency. Thus in a case involving the administration of the tariff act and the payment of customs-duties under protest, it appeared that the United States Circuit Court for the Southern District of New York, many years before, had decided that a prospective protest was valid, that is, a protest notifying

the collector that it was to apply to all future similar importations. Notwithstanding a regulation of the Treasury Department, requiring a specific protest in each case, this decision was generally accepted as correct, and a practice grew up under it, which was followed during all the intervening time, of paying excessive duties under such prospective protests. In error to the court mentioned, the Supreme Court refused to reverse or change the rule. "It is now," said the court, "and has been for a long time, the settled law of that court and the general practice prevailing in the port of New York. * * * It is an acknowledged principle of law that if rights have been acquired under a judicial interpretation of a statute, which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction; and if, notwithstanding treasury regulation No. 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity." [15] It is also proper to be added, as pertinent to the present subject, that it is the settled law of the Supreme Court that the concurrent findings or decisions of two of the inferior courts on questions of fact in admiralty cases,—such as the seaworthy or unseaworthy condition of the vessel at the commencement of the voyage, or the cause of water damage to cargo as related to the manner of loading or unloading,—will be accepted as correct and followed unless clearly proven to be erroneous.[16]

[15] Schell v. Fauché, 138 U. S. 562, 11 Sup. Ct. 376, 34 L. Ed. 1040.

[16] Wuppermann v. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; International Nav. Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; Oceanic Steam Nav. Co. v. Aitken, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610.

CONSTRUCTION OF STATE STATUTES

98. Upon questions concerning the construction of the constitution or laws of a state, the inferior courts of the United States are bound to follow the decisions of the court of last resort in that state, unless a different interpretation has been declared by the Supreme Court of the United States, which in that case, must be followed in preference to the rulings of the state courts.

It is a settled general principle, which will be more fully discussed in a later chapter,[17] that all the courts of the United States, superior and inferior, are bound to accept and follow the decisions of the court of last resort in a state on all questions concerning the interpretation of its constitution or its statutes, unless some federal question is involved, such as the conformity of the particular provision to the federal constitution or laws. If the question arises for the first time in an inferior federal court, it will decide it according to its own best judgment, but if the state court of last resort afterwards puts a different construction upon the statute in question, the federal court will abandon its former position and thereafter conform to the authority of the state court.[18] If, at the time the question arises in a lower federal court, it has not yet been answered by the supreme court of the state, but the Supreme Court of the United States has rendered a decision fairly in point, upon the interpretation of the statute, the lower federal court will of course follow that decision.[19] But the important principle for our present purpose is that, in case of a conflict between the supreme court of the state and the supreme court of the nation on a question of this kind, the lower

[17] Infra, chapter XIV.

[18] Leighton v. Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641; Nesmith v. Shelden, 4 McLean, 375, Fed. Cas. No. 10,125.

[19] Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co. (C. C. 71 Fed. 29.

courts of the federal system are bound to follow the decision of the highest federal court, not that of the highest state court. In other words, where the United States Supreme Court decides a case involving the construction of a state statute, as to which there are as yet no decisions by the highest court of the state, the inferior federal courts will follow that decision, until it is reviewed and changed by the Supreme Court, even if the state court afterwards announces a contrary decision on the same point.[20] It remains to be added that, in the absence of a more direct authority, one federal circuit court will follow the ruling of another circuit or district court in another state as to the construction of the constitution or a statute of the latter state.[21]

COMITY BETWEEN CO-ORDINATE COURTS

99. A court of the United States is never absolutely bound to follow the decision of another court of co-ordinate jurisdiction in a similar case; but ordinarily it will do so, from motives of comity and for the sake of securing uniformity in the law and its administration, especially where the earlier decision relates to the administration of the same subject-matter, unless clearly satisfied of error.

Although they are divided geographically in jurisdiction, the various inferior courts of the United States constitute but a single system, and when one of these courts has fully considered and deliberately decided a particular question of law, it is eminently proper, for the sake of the harmonious and efficient administration of the law, as well as in consideration of the respect which they mutually owe to each other, that such decision should be accepted as correct and followed by other co-ordinate courts, a decision of a circuit court of appeals by the other circuit courts of

[20] Neal's Lessee v. Green, 1 McLean, 18, Fed. Cas. No. 10,065.
[21] White v. The Cynthia, Fed. Cas. No. 17,546a.

appeals, a decision of a circuit or district court by othe
circuit and district courts. Especially when two or mor
such decisions concur upon the point in question, it i
highly important and desirable, for the sake of securin
uniformity of decision, that they should be recognized a
precedents and respected as such by the other courts o
equal rank, until reversed by a higher authority. And thi
is the well established practice of the federal courts.[2
Even if the court is not thoroughly satisfied of the correct
ness of the earlier decision, or might incline to take a dif
ferent view of the matter in question in the absence of an
precedent, still there is no dereliction of judicial duty i
following the previous ruling, in consideration of the im
portant reasons for doing so, which, in fact, underlie th
whole doctrine of stare decisis.[23] Yet, as co-ordinate court
or courts of equal rank have no authority over each othe
and each is just as fully entitled as any other to set up it
own decision as a precedent, no one of them is bound, i
any absolute legal sense, to follow the decisions of an
other.[24] Indeed, it has been very pertinently remarke
that every suitor is entitled to the independent considera
tion and judgment of the court which has his case befor
it, although the particular question may have been decide
adversely to his view in a similar case in a court of equa
rank; and while it is highly desirable that there should b
uniformity of decision upon the same question, yet ther
rests upon the court the duty of determining by its own in
vestigation and judgment the matter at issue, in which in

[22] Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677; United States
F. A. Marsily & Co., 165 Fed. 186, 91 C. C. A. 220; Reed v. Atlanti
& P. R. Co. (C. C.) 21 Fed. 283; Hayes v. Dayton (C. C.) 20 Fed. 69
Wells v. Oregon & C. R. Co. (C. C.) 15 Fed. 561; Goodyear v. Prov
dence Rubber Co., 2 Cliff. 351, Fed. Cas. No. 5,583; Goodyear Dents
Vulcanite Co. v. Willis, 1 Flip. 388, Fed. Cas. No. 5,603; Erie R. C
v. Russell, 183 Fed. 722, 106 C. C. A. 160.

[23] United States v. Stone & Downer Co., 175 Fed. 33, 99 C. C. A
49; The Chelmsford (D. C.) 34 Fed. 399; Celluloid Mfg. Co.
Zylonite Brush & Comb Co. (C. C.) 27 Fed. 291.

[24] Northern Pac. R. Co. v. Sanders (C. C.) 47 Fed. 604, Blake
Robertson, Fed. Cas. No. 1,501.

vestigation a former decision of a similar issue by a court of like authority is of persuasive value but not of binding force.[25] In fact, federal courts follow the decisions of other federal courts of equal rank on the principle of comity alone; and this principle, while it is highly important, is not a rule of law, but simply a rule of expediency. Hence, for example, a circuit court of appeals in one circuit is not absolutely bound by a decision of the circuit court of appeals in another circuit; and while proper deference should be paid to the opinion of a co-ordinate court, and while a court which is in doubt as to the soundness of its own views may properly render a decision in accordance with the views of another court of equal authority, in order to secure uniformity and prevent confusion, yet the principle of comity does not require such a court to surrender its individual judgment.[26]

Moreover, there may be exceptional circumstances in any given case which would render it inexpedient to follow the decision of the court in another circuit, as, where it would involve a wide departure from the doctrines and rules previously regarded as established, to the prejudice of individuals who had relied on them as settled, or where such a course would produce incongruous or conflicting results, for which there would be no legal remedy.[27] Nor can any court be expected to overrule its own decisions, merely in view of the fact of contrary decisions having been made by another court which has no appellate jurisdiction over the first. Hence, for example, where two of the circuit courts of appeals have reached differing conclusions in cases involving the same question, and another like case is afterwards presented to the court making the earlier decision, it will not change its determination of the question, unless entirely persuaded by the decision of the other court that its former conclusion was wrong, the bet-

[25] Heckendorn v. United States, 162 Fed. 141, 89 C. C. A. 165; F. B. Vandegrift & Co. v. United States, 173 Fed. 609, 97 C. C. A. 469.

[26] Mast, F. & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 710, 44 L. Ed. 858.

[27] Kinney v. Conant, 166 Fed. 720, 92 C. C. A. 410.

ter course in such a case being to adhere to its former ru ing and leave it to the Supreme Court to insure uniformit of decision by determining which of the conflicting dec sions was correct.[28] And at any rate, neither the princip of comity nor the rule of stare decisis requires the dec sion of a case to be made in conformity with views e pressed elsewhere, unless the decision cited is really precedent, that is, an explicit determination of the identic question of law, arising out of the same facts, without an substantial difference or point of distinction.[29]

But where a suit constitutes in reality but another branc of the same litigation begun in another court, or involv the administration of the same subject-matter, the du of accepting and following the decisions made in the c ordinate court becomes almost imperative, since it no rests not alone on the principle of comity, but also on th necessity of avoiding conflicting rulings upon the rights the same parties or the status of exactly similar interest Hence, for example, where the affairs of an insolvent co poration are to be wound up in a federal court in the sta of its domicile, the rule adopted by that court for accoun ing and settlement between the receiver of the corporatic and its creditors or stockholders will be followed by th federal court of another district, which has appointed a ancillary receiver.[30] So a petition by the receiver of railroad company for an injunction restraining receivers another line from diverting freight traffic will be grante when the circuit court of another circuit has afforded th petitioner the same relief in a similar case against a other company.[31] And a decision in another circuit, in a action between two railroad companies, that the right action for unpaid dividends due under a lease is in the le

[28] Henry E. Frankenberg Co. v. United States, 146 Fed. 63, C. C. A. 514.

[29] Edgarton v. Furst & Bradley Mfg. Co. (C. C.) 9 Fed. 450.

[30] Manship v. New South Building & Loan Ass'n (C. C.) 110 Fe 845; MacMurray v. Gosney (C. C.) 106 Fed. 11.

[31] Grand Trunk R. Co. v. Central Vermont R. Co. (C. C.) Fed. 66.

sor corporation, and not in its individual stockholders, will be followed in an action by stockholders of that company against the lessee for an accounting of such dividends.[82] But it has been stated generally that this rule or principle of comity as between the federal courts has no application, either by its terms or the reason on which it is founded, to motions for injunctions, where error may be followed by irremediable mischief.[83]

SPECIAL RULE IN PATENT CASES

100. In cases involving the validity of a patent for an invention or discovery, or rights of parties thereunder, a decision made by a federal circuit court or circuit court of appeals will be followed, without re-examination of the questions involved, by all other co-ordinate courts, in so far as it covers the same issues, unless in case of a very clear mistake of law or fact or unless important newly-discovered evidence is presented.

When one of the federal circuit courts (or a circuit court of appeals, reviewing its decision,) has considered and determined the validity or invalidity of a patent, or issues involving questions of patentability, novelty or the want of it, anticipation, infringement, the construction of the patent, or the rights of parties under it, it is the duty of all other courts of like jurisdiction to accept and follow that decision, without entering upon an examination of the questions involved and decided, unless there is presented in the later case some new evidence of such weight and importance that it would most probably have caused a different decision if considered in the earlier case, or unless the court trying the later case is entirely and thoroughly satisfied that there was a clear mistake of law or fact

[82] Reed v. Atlantic & P. R. Co. (C. C.) 85 Fed. 692; s. c., 21 Fed. 283.

[83] Many v. Sizer, 1 Fish. Pat. Cas. 81, Fed. Cas. No. 9,057.

in the earlier decision. And this rule is almost universal accepted and acted on.[84] It is supported not only by t general principle of comity already adverted to, but al by the necessity of avoiding, wherever possible, conflic ing decisions in different parts of the country upon t same subject-matter. Both the rule and the reasons up which it is based were very well stated by Mr. Justi Brown (at circuit) in the following language: "Upon ge eral questions of law, we listen to the opinions of o brother judges with deference, and with a desire to co form to them, if we can conscientiously do so, but we not treat them as conclusive. In patent causes, howev where the same issue has been passed upon by the c cuit court sitting in another district, it is only in case clear mistake of law or fact, of newly-discovered testimon or upon some question not considered by such court, th we feel at liberty to review its findings. A division opinion upon the same issue might give rise to litigation a dozen different districts, to conflicting decrees, and to i terminable contests between rival patentees. In case t defeated party is dissatisfied with the first decision, it his right to resort to the appellate court, where a final d

[84] Meyer v. Goodyear India-Rubber Glove Mfg. Co. (C. C.) Fed. 891; American Ballast Log Co. v. Cotter (C. C.) 11 Fed. 7 Searls v. Worden (C. C.) 11 Fed. 501; McCloskey v. Hamill (C. 15 Fed. 750; Worswick Mfg. Co. v. City of Philadelphia (D. C.) Fed. 625; Hancock Inspirator Co. v. Regester (C. C.) 35 Fed. Kidd v. Ransom (C. C.) 35 Fed. 588; American Bell Tel. Co. v. W lace Electric Tel. Co. (C. C.) 37 Fed. 672; Simonds Counter Mach ery Co. v. Knox (C. C.) 39 Fed. 702; Thompson v. E. P. Donn Mfg. Co. (C. C.) 40 Fed. 383; National Cash-Register Co. v. Ame can Cash-Register Co. (C. C.) 47 Fed. 212; Enterprise Mfg. Co. Deisler (C. C.) 46 Fed. 854; National Cash-Register Co. v. Americ Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559; Edison Electric Li Co. v. Philadelphia Trust, etc., Co. (C. C.) 60 Fed. 397; Edison El tric Light Co. v. Packard Electric Co. (C. C.) 61 Fed. 1002; Nati al Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. 95 Fed. 991; Cutter Electrical & Mfg. Co. v. Anchor Electric Co. C.) 97 Fed. 804; American Fur Refining Co. v. Cimiotti Unhairi Mach. Co., 123 Fed. 869, 59 C. C. A. 357. This rule is also follow by the courts of the District of Columbia. See Brill v. Washingt Ry. & Electric Co., 30 App. D. C. 255.

cision can be obtained, which all inferior courts are bound to respect." [35] And the fact that the act of Congress of March 3, 1891, creating the circuit courts of appeals, in the sixth section thereof, took away the appellate jurisdiction of the Supreme Court of the United States in patent cases, did not affect the doctrine of comity between the circuit courts, so as to diminish the weight which should be given to a prior decision in another circuit in relation to the same patent.[36] If, for instance, a court issues an injunction to prevent the infringement of a patent, solely on the authority of a decision in another circuit in a suit between the same parties, it will, on a motion for an attachment for contempt in violating the injunction, follow the construction which was placed upon the patent in such other circuit.[37] And since the rule in question is not one of law, but of comity merely, the complainant in a later suit will not be required to produce strict legal proof, by the introduction of a full transcript of the record in the former suit, to show that the same issues or defenses were relied on and considered therein, but the fact may be shown by the opinion filed and by the testimony of witnesses shown to have knowledge.[38]

Naturally this rule does not apply where there are new features in the case at bar distinguishing it from cases elsewhere adjudicated, because in that case the prior decisions are not precedents. If, therefore, new claims or new defenses are presented to the court, or new evidence of a substantial and important nature, it will not feel bound to follow the prior decisions without an independent consideration of the subject.[39] But where, as is commonly the case, the claims or defenses are numerous, some of them already

[35] Searls v. Worden (C. C.) 11 Fed. 501. And see Office Specialty Mfg. Co. v. Winternight & Cornyn Mfg. Co. (C. C.) 67 Fed. 928.

[36] Overman Wheel Co. v. Curtis (C. C.) 53 Fed. 247.

[37] Accumulator Co. v. Consolidated Electric Storage Co. (C. C.) 53 Fed. 793.

[38] New York Filter Mfg. Co. v. Jackson (C. C.) 112 Fed. 678.

[39] Green v. French (C. C.) 11 Fed. 591; Bragg Mfg. Co. v. City of New York (C. C.) 141 Fed. 118; Spring v. Domestic Sewing Machine Co. (C. C.) 9 Fed. 505.

considered and disposed of elsewhere and some novel, t court trying the case will not enter upon a fresh investig tion of the matters already adjudged, but only of the ne features. Thus, for instance, in a suit for infringemer where it appears that the courts of other circuits have a ready sustained the validity of the patent as against a the defenses now made except that of anticipation by re son of certain patents not before in evidence, and have al found that defendants infringed, the court will accept tho decisions and will examine only the alleged anticipation. A plain and palpable mistake of law or fact in the earli decision will also be sufficient ground for refusing to fo low it.[41] But not so where there is in the mind of t court merely a doubt—even a "grave doubt"—as to the co rectness of the prior ruling.[42] And while this rule of cor ity will apply in all ordinary circumstances, it is too la to call upon a court to defer to the opinion of another cou of co-ordinate jurisdiction after it has come to a differe conclusion and has entered a decree in ignorance of t prior adjudication.[43] But where two decisions have be rendered in another circuit, in regard to the validity of given patent, the one overruling the other on rehearing, t last will be followed, as the final conclusion of that court.

With respect to the courts upon which this rule or pri ciple is obligatory, it is quite clearly settled that the circu courts (and now the district courts), in the absence of a adjudication by the circuit court of appeals having appe late jurisdiction over them, may with propriety, and shoul accept and follow the decision on a similar state of fac

[40] National Folding Box & Paper Co. v. Phœnix Paper Co. (C. 57 Fed. 223.

[41] Searls v. Worden (C. C.) 11 Fed. 501; Hammerschlag v. Garr (C. C.) 9 Fed. 43.

[42] Searls v. Worden (C. C.) 11 Fed. 501; Heaton-Peninsular Bu ton-Fastener Co. v. Elliott Button-Fastener Co. (C. C.) 58 Fed. 2 Macbeth v. Gillinder (C. C.) 54 Fed. 169.

[43] Consolidated Roller-Mill Co. v. George T. Smith Middlings Pu fier Co. (C. C.) 40 Fed. 305.

[44] Brown Mfg. Co. v. Mast (C. C.) 53 Fed. 578.

made by the circuit court of appeals in any other circuit.[45] But the circuit courts of appeals in several circuits, and perhaps we may say generally, consider themselves exempt from this rule, and not only entitled but bound to exercise an independent judgment in patent cases, as in all others, irrespective of decisions made elsewhere.[46] In one of the cases cited it was said by Dallas, J., in the circuit court of appeals for the third circuit: "The decisions of the several circuit courts, whenever pertinent, will be attentively considered by this tribunal; but because they are subject to appeal, and for other manifest reasons, it is not admissible for a court of review to accord them controlling effect. Accordingly, we have in this instance carefully examined the opinion of the learned circuit judge of the first circuit, but, though regarding it with sincere respect, we find ourselves unable to concur in it."[47] So the circuit court of appeals for the second circuit, in a patent case, remarks: "The adjudication upon which the motion for preliminary injunction was based, not being the subject of the appeal, is to have the same weight which it should have before the circuit court. But while the circuit court, upon a motion for an injunction, might deem itself constrained, contrary to its own judgment, to adopt the rulings of another circuit court upon questions of law made at final hearing, this court is at liberty to re-examine such rulings, dispose of the questions of law conformably to its own convictions, and accord to the former adjudication such weight as in its own judgment it was entitled to upon the motion. In the absence of some controlling reason for disregarding it, the former adjudication should have the same weight in

[45] Duff Mfg. Co. v. Norton (C. C.) 96 Fed. 986; Beach v. Hobbs, 92 Fed. 146, 34 C. C. A. 248; New York Filter Mfg. Co. v. Jackson (C. C.) 112 Fed. 678.

[46] American Paper Pail & Box Co. v. National Folding Box & Paper Co., 51 Fed. 229, 2 C. C. A. 165; Curtis v. Overman Wheel Co., 58 Fed. 784, 7 C. C. A. 493; National Cash-Register Co. v. American Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559; Wanamaker v. Enterprise Mfg. Co., 53 Fed. 791, 3 C. C. A. 672.

[47] National Cash-Register Co. v. American Cash-Register Co., 53 Fed. 367, 3 C. C. A. 559.

this court which it has as the foundation for a preliminar injunction before the circuit court." [48] And in the seven circuit it is held by the inferior courts, following the lea of the circuit court of appeals, that decisions of the cour of other circuits, on questions of the validity or infring ment of a patent, will not be followed, but each case mu be determined on its merits as disclosed by the recor giving only persuasive effect to the decisions of other cour on the same facts. "Complainant seeks to have this cou follow the decisions of the courts of the second circuit upo the questions of validity and infringement, in accordan with a rule of comity which is said to prevail in some ci cuits; but the utterances of the court of appeals of th circuit have been positive to the effect that each case in th circuit must be decided upon its merits as disclosed by th record therein, and that a ruling or opinion of any oth circuit court or court of appeals upon any question i volved should be given only its just and reasonable weig according to the circumstances; and it therefore follow that this court should give weight to the said decisions the second circuit only to the extent that the reasonin therein, as applied to the facts presented by this recor may be persuasive." [49]

SPECIAL RULE AS TO TARIFF CASES

101. For the sake of uniformity and certainty in the co struction of the tariff act and the assessment duties thereunder, a decision of any inferior intermediate court of the United States, not a pealed or directly questioned, will be treated wi special deference by any court of co-ordinate j risdiction, and will be followed unless plain founded in mistake of fact or error of law.

[48] American Paper Pail & Box Co. v. National Folding Box Paper Co., 51 Fed. 229, 2 C. C. A. 165.

[49] Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight (C. C.) 100 Fed. 648.

uits having to do with the assessment and collection stoms duties on imports, or involving the interpreta- f the tariff act, uniformity in the judgments of the of first instance, as well as in those of the appellate als, is highly desirable, in order not only to inform ters of their rights and duties, but also to avoid the ly of different rules and different readings of the the different ports of entry. Accordingly it was held where a federal circuit court had decided a particular on of this kind, and its judgment had not been ap- from nor made the subject of any direct attack, it to be accepted as correct and followed, not only by rcuit courts in other circuits and districts, but even by rcuit court of appeals in another circuit, when the question was raised again, unless clearly based on take of fact or erroneous in law.[59] It should be re- d, however, that although this rule has not been de- r repudiated, it has lost its importance of late by the on of the Court of Customs Appeals, having direct ate jurisdiction over the boards of appraisers.

UIT COURT OF APPEALS AND INFERIOR COURTS OF SAME CIRCUIT

A circuit or district court of the United States is imperatively bound to follow the decisions of the circuit court of appeals in the same circuit, if any, in preference to the decisions of all other courts, state or national, except in the case of a contrary decision by the Supreme Court of the United States. But the decisions of the circuit or district courts are not binding as precedents upon the circuit court of appeals.

en a legal question is presented for solution to an in- federal court, and no decision thereon has been made

ll v. Francklyn & Ferguson, 162 Fed. 880, 89 C. C. A. 570; aker v. United States (C. C.) 169 Fed. 664.

by the circuit court of appeals having direct jurisdictio over it, it is at liberty to seek for guidance or a rule of de cision in the adjudications of other federal courts or c the state courts, or to follow the general current or tren of judicial authority elsewhere. But when a circuit cou of appeals has pronounced its decision upon a matter of law it becomes a closed question for the inferior federal court in that circuit. They are no longer free to re-examine th matter or to decide it according to their independent judg ment. The decision of the court above is a conclusive an binding precedent and must be followed.[51] Thus, fo example, when the circuit court of appeals has decided tha a claim in a patent is entitled to a broad and liberal con struction, a circuit court cannot afterwards adopt a nar rower construction, on the ground that the language of th claim was restricted while in the patent office; for the de cision of the appellate court must be accepted implicitl and to its full extent, and in the spirit as well as the letter.[5 Moreover, it is entirely immaterial that circuit courts, c even circuit courts of appeals, in other circuits, may hav rendered contrary or conflicting decisions, or that the high est court of the state may entertain a different view of th matter, or that the decision in question may be contrary t the general preponderance of authority, or that it may ap pear to the mind of the circuit or district judge to be e roneous and indefensible; it is none the less his duty t follow it, in preference to all other rulings elsewhere, be cause it alone is the binding and imperative precedent fo his determination of the issue.[53] Of course this statemen is made on the supposition that the particular decision c the circuit court of appeals has not been overruled no reversed by the Supreme Court of the United States. I

[51] Roche v. Jordan (C. C.) 175 Fed. 234; The Fayerweather Wi Cases (C. C.) 118 Fed. 943; In re Thompson (D. C.) 179 Fed. 874.

[52] Norton v. Wheaton (C. C.) 57 Fed. 927.

[53] Edison Electric Light Co. v. Bloomingdale (C. C.) 65 Fed. 21 United States v. Adams Express Co. (D. C.) 119 Fed. 240.

tter case, it would be the duty of the inferior courts low the ruling of the highest appellate tribunal, in- of that of the intermediate court.

somewhat different problem is presented when the on of a circuit court of appeals stands unreversed or ppealed from, but the Supreme Court of the United s has rendered a different decision in a case appealed another circuit. In that event, it would seem to be y the duty of an inferior federal court to disregard ecision of the circuit court of appeals, and follow the ication of the Supreme Court, not only because the court is the final and paramount authority in the l judicial system, but also on the reasonable assump- hat the circuit court of appeals will abandon its former on and change its ruling, when the question is again nted to it, in deference to the opinion of the Supreme . But to warrant an inferior court in taking this e, the conflict of opinion between the two upper courts be perfectly plain and unmistakable. If the con- ty of opinion between those two courts is not so clear exclude the idea of their views being reconcilable on common ground,—in other words, if the antagonism en their decisions is a question on which trained ju- opinions may fairly and honestly differ,—an inferior will not be justified in assuming that such an antag- exists, and thereupon proceeding to re-examine a on which its own circuit court of appeals has clearly ed.[54]

the other hand, the decisions of the circuit and dis- courts, whether rendered before the creation of the t courts of appeals or since that time in cases not ht up for review, are not of any binding or controlling rity in the circuit court of appeals. They may be ed to respectful and attentive consideration, and ac- d such influence as may be due to the cogency of the n or the learning of the judge, but they are not such dents as the rule of stare decisis contemplates. In

[54] rton v. Wheaton (C. C.) 57 Fed. 927.

regard to such decisions it is remarked by one of the cir cuit courts of appeals that, "because they are subject to ap peal, and for other manifest reasons, it is not admissibl for a court of review to accord them controlling effect." [5] But still there are exceptional cases in which the intermedi ate court may accept as correct the decision of the inferio court, whether in the same or another circuit, and decline t change the rule established thereby, on grounds of publi policy or expediency. We have seen, on an earlier pag that this may be done, and indeed that it is eminently prop er to be done, in the case of a decision putting a construc tion upon the tariff act or establishing a rule with referenc to the assessment of customs duties,[56] and other simila cases may easily be imagined. But it must be remembere that the motive which induces such a course is one of ex pediency only, and not judicial comity nor an applicatio of the doctrine of precedents. Even in the peculiarly fa vored case of a "rule of property," there is no obligatio upon the appellate court to adopt the rulings of the inferic court. Decisions of a circuit or district court of the Unite States, though they may have stood unappealed and unre versed for any given length of time, cannot be regarded a establishing a rule of property to which it is the duty c the circuit court of appeals to adhere under the doctrine c stare decisis.[57]

[55] National Cash-Register Co. v. American Cash-Register Co., 5 Fed. 367, 3 C. C. A. 559.

[56] See ante, p. 328. And see Hill v. Francklyn & Ferguson, 16 Fed. 880, 89 C. C. A. 570.

[57] American Mortgage Co. of Scotland v. Hopper, 64 Fed. 553, 1 C. C. A. 293.

CUIT COURT OF APPEALS AND INFERIOR COURTS IN OTHER CIRCUITS

The decisions of a circuit court of appeals should be followed by the circuit and district courts in other circuits, in the absence of any contrary or conflicting rulings by the Supreme Court or by the appellate courts of their own circuits.

hough it is certainly true that a circuit or district court e United States is not imperatively bound to follow ecisions of a circuit court of appeals in another cir- in the absence of any more direct precedent, and to xclusion of its own independent judgment,[58] yet such ons are properly to be regarded as having more effect reater persuasive influence in the various other federal s than are ordinarily given to the judgments of the st tribunals of the states or of other federal courts erely equal rank or concurrent jurisdiction.[59] And fore, for the sake of uniformity and an orderly ad- tration of the law, great deference should be paid to tinent decision of the circuit court of appeals in an- circuit, and it should be followed even though there oe some doubt of its correctness (or unless it is plain- roneous), when the particular point in question has een decided by the appellate court in the same cir- or by the Supreme Court of the United States.[60] But e other hand, a circuit court of appeals is not required, onsiderations of comity, to follow the decision of a it court of another circuit, on questions relating to alidity of a patent or other questions.[61]

ontinental Securities Co. v. Interborough Rapid Transit Co. 165 Fed. 945.

each v. Hobbs (C. C.) 82 Fed. 916.

airfield Floral Co. v. Bradbury (C. C.) 87 Fed. 415; Hatch e Battery Co. v. Electric Storage Battery Co., 100 Fed. 975, C. A. 133; Hale v. Hilliker (C. C.) 109 Fed. 273; In re Baird 154 Fed. 215; Thomson-Houston Electric Co. v. Holland (C. 3 Fed. 903.

cNeely v. Williames, 96 Fed. 978, 37 C. C. A. 641.

AS BETWEEN DIFFERENT JUDGES IN SAME COURT

104. Judges sitting in the same court should not attempt to overrule each other's decisions or make contradictory or conflicting rulings in the same case or in relation to the same subject; but each should defer to and accept the decisions already made.

It is highly improper judicial procedure for judges having equal rank and authority in the same court to hand down contrary or conflicting decisions in the same case, or in relation to the same subject-matter under the administration of the court, or for one to attempt to overrule a decision previously given therein by the other. This rule is said to be especially applicable to questions of property and of practice, and is not to be departed from except for the most urgent reasons.[62] At the same time, the application of the rule should not be allowed to deprive an aggrieved party of the right to review a ruling following an erroneous decision of another judge.[63] Instances of this kind rarely occur, but the proper procedure in case of such a conflict of opinion is indicated in a case in the United States district court for the southern district of Ohio. For a special reason, a term of that court was presided over by the district judge

[62] Plattner Implement Co. v. International Harvester Co. of America, 133 Fed. 376, 66 C. C. A. 438; Boatmen's Bank of St. Louis, Mo. v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Taylor v. Decatur Mineral & Land Co. (C. C.) 112 Fed. 449; Oglesby v. Attrill (C. C.) 14 Fed 214; Cole Silver-Min. Co. v. Virginia & Gold Hill Water Co., 1 Sawy 685, Fed. Cas. No. 2,990; Central Trust Co. of New York v. United States Flour Milling Co. (C. C.) 113 Fed. 587; Hadden v. Natchaug Silk Co. (C. C.) 84 Fed. 80. For decisions of state courts recognizing and applying the same rule, see Peel v. Elliott, 16 How. Prac. (N Y.) 484; Hunter v. Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep 907; Hungerford v. Cushing, 2 Wis. 411. For a consideration of the force of rulings or decisions made by another judge in the same cause as the "law of the case," see supra, p. 274.

[63] Plattner Implement Co. v. International Harvester Co. of America, 133 Fed. 376, 66 C. C. A. 438.

of the western district of Tennessee, and in a case on the docket involving the affairs of an insolvent bank, he held that a deposit of money should properly be set off against the bank's claim upon the depositor. But the district judge of the southern district of Ohio had previously held, in an action between the same bank and one of its creditors (the circuit judge concurring in his opinion), that the plea of set-off was not available. Thereupon, in order that there might not be different rules of set-off in the same court in the case of the same insolvent, and as the case could not be appealed, it was ordered that it should be remanded for reargument before the regular judges, who might, in their discretion, provide for a dissent of record, or take such other course as might seem right to them in the premises.[64]

[64] Louis Snyder's Sons Co. v. Armstrong (C. C.) 37 Fed. 18.

CHAPTER IX

DECISIONS OF FEDERAL COURTS AS AUTHORITIES IN STATE COURTS

105. Federal Questions in General.
106. Validity and Construction of Acts of Congress.
107. Jurisdiction and Powers of Federal Courts.
108. Interpretation and Application of Federal Decisions
109. Questions of General Jurisprudence or Local Law.
110–111. Validity and Construction of State Statutes.
112. Commercial Law.
113. Decisions of Inferior Federal Courts.
114. Rule for Inferior State Courts.
115. Rule for Territorial Courts.

FEDERAL QUESTIONS IN GENERAL

105. In a case involving a federal question, that is, o arising under the Constitution, laws, or treaties the United States, the courts of the states will imperatively bound to follow the decisions of t Supreme Court of the United States, if any a found to be applicable to the case on trial, ov ruling, if necessary, their own previous decisions the contrary.

General Rule and Its Foundation

The Constitution of the United States, together with t laws made by Congress in pursuance thereof and treati made under the authority of the United States, constitu the "supreme law of the land," and the judges in every sta are to be bound thereby, notwithstanding anything to t contrary in the constitution or laws of any state.[1] T final interpreter and expositor of the constitution and la of the United States is the Supreme Court of the Unit States, and its decisions, when they relate to the constru tion or application of either, are conclusive evidence what the supreme law is. Moreover, that court has jur

[1] Const. U. S. art. 6, par. 2.

n to re-examine and to reverse the final judgment or
e of the court of last resort in any state, rendered in
involving the validity of a statute or treaty of the
d States, or the validity of any state statute which is
ed on the ground of its being repugnant to the con-
on, laws, or treaties of the United States, or in which
itle, right, privilege, or immunity is claimed under
deral constitution or laws or a commission held or
rity exercised under the United States, provided, in
case, that the decision of the state court is adverse to
ght or claim set up under the constitution or laws of
nion.[2] For these reasons, where a suit in the state
involves a question arising under the constitution,
or treaties of the United States,—or what is common-
ed a "federal question,"—any decision of the United
Supreme Court upon the point at issue is to be re-
d as not only a precedent entitled to consideration,
absolutely binding and authoritative; and even al-
h the supreme court of a state should entertain a
lly different view, yet it will decide in accordance
the ruling of the supreme federal tribunal, and will
if necessary, reverse or overrule its own previous de-
s to the contrary.[3] This is illustrated by the follow-

liciary Act Sept. 24, 1789, c. 20, § 25, 1 Stat. 85; Rev. St. U. S. U. S. Comp. St. 1901, p. 575).

ited Land Ass'n v. Abrahams, 208 U. S. 614, 28 Sup. Ct. 569, Ed. 645; Williams v. City of Talladega, 164 Ala. 633, 51 330; Alford v. State (Ala.) 54 South. 213; United Land Ass'n ific Imp. Co., 139 Cal. 370, 69 Pac. 1064; Foss v. Johnstone, l. 119, 110 Pac. 294; Belcher v. Chambers, 53 Cal. 635; Smith r, 46 Colo. 364, 104 Pac. 401; Hempstead v. Reed, 6 Conn. Black v. Lusk, 69 Ill. 70; McInhill v. Odell, 62 Ill. 169; man v. Martin, 54 Ind. 380; Leavenworth, L. & G. R. Co. v. 16 Kan. 510; Bank of United States v. Norton, 3 A. K. Marsh. 122; Bodley v. Gaither, 3 T. B. Mon. (Ky.) 57; Eubank v. 5 T. B. Mon. (Ky.) 285; Saloy v. City of New Orleans, 33 n. 79; State v. Ardoin, 51 La. Ann. 169, 24 South. 802, 72 Rep. 454; Laughlin v. Louisiana & N. O. Ice Co., 35 La. Ann. Braynard v. Marshall, 8 Pick. (Mass.) 194; In re Opinion of stices, 207 Mass. 601, 94 N. E. 558; Mooney v. Hinds, 160 469, 36 N. E. 484; State v. Louisville & N. R. Co. (Miss.) 51 918; Barber Asphalt Pav. Co. v. French, 158 Mo. 534, 58 S.

ing remark once made by the Supreme Court of Pennsy vania: "We not only assent, as we always have done, the principle announced by the Supreme Court of t United States in the Dartmouth College Case, but we a perfectly aware that, whether we so assent or not, we mu as a subordinate jurisdiction, give to that case its prop effect." [4]

Early Dissent from This Doctrine

The doctrine that the decisions of the Supreme Court the United States, on questions arising under the cons tution and laws of the Union, are imperatively bindi upon the state courts was not at first universally accepte nor was it finally established without energetic protest a vigorous dissent in several of the states. The Supre Court of Georgia declared that it was "co-equal and co-o dinate with the Supreme Court of the United States, a not inferior and subordinate to that court," and therefo that the supreme federal court had no jurisdiction to ma for the court of Georgia a precedent as to the constru tion of the United States Constitution.[5] At an earlier da the court in Connecticut, without going to such a leng had remarked that it was "no improper condescension"

W. 934, 54 L. R. A. 492; State v. Warner, 165 Mo. 399, 65 S. 584, 88 Am. St. Rep. 422; McElvain v. St. Louis & S. F. R. Co., 1 Mo. App. 126, 131 S. W. 736; State v. Cudahy Packing Co., 33 Mo 179, 82 Pac. 833, 114 Am. St. Rep. 804; State v. Insurance Co. North America, 71 Neb. 320, 106 N. W. 767; State ex rel. Board Transportation v. Sioux City, O. & W. R. Co., 46 Neb. 682, 65 N. 766, 31 L. R. A. 47; Newmarket Bank v. Butler, 45 N. H. 236; Hic v. Hotchkiss, 7 Johns. Ch. (N. Y.) 297, 11 Am. Dec. 472; People rel. Pennsylvania R. Co. v. Wemple, 138 N. Y. 1, 33 N. E. 720. L. R. A. 694; Pennsylvania R. Co. v. Duncan, 111 Pa. 352. 5 A 742; Commonwealth, to Use of United States, v. Lewis, 6 Bin. (P 266; Miller v. State, 3 Okl. Cr. 457, 106 Pac. 810; Mottu v. Dav 151 N. C. 237, 65 S. E. 969; McCandless v. Richmond & D. R. C 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440; Toncray v. Toncr (Tenn.) 131 S. W. 977; Osborne v. Barnett, 1 White & W. Civ. C Ct. App. (Tex.) § 129; State v. Scampini, 77 Vt. 92, 59 Atl. 2 Spokane & B. C. Ry. Co. v. Washington & G. N. Ry. Co., 49 Wa 280, 95 Pac. 64.

[4] Pennsylvania R. Co. v. Duncan, 111 Pa. 352, 5 Atl. 742.

[5] Padelford v. Mayor, etc., of City of Savannah, 14 Ga. 438.

te court to yield to the opinion of the United States
eme Court on a question as to the construction of
ederal constitution, "where a harmonious concurrence
inion is otherwise unattainable."[6] So again, in Ohio,
tion concerning the validity of a statute of that state
imposed taxes on certain banks, contrary to a pro-
in their charters exempting them from taxation, led
notable judicial conflict between the highest court of
tate and the Supreme Court of the United States.
latter court decided that the statute in question was
as being in conflict with that provision of the fed-
constitution which forbids the passage of laws im-
g the obligation of contracts. But the Supreme
of Ohio emphatically refused to be bound by this
on and persisted in adhering to its own previous
gs in favor of the validity of the statute. It de-
that there was no constitutional or legislative pro-
which made it in any sense subordinate or inferior to
upreme Court of the United States, and that, even
at class of cases in which its decisions were by law
vable by the Supreme Court of the United States on
the rulings of the federal court, while entitled to the
st respect, did not bind or conclude the state court
revent it from exercising its independent judgment
e question at issue. But these cases were carried up
e supreme federal court and there reversed, that tri-
being of course amply able to vindicate its authority
nforce obedience to its mandate.[7] Yet as late as 1875,
upreme Court of Ohio took occasion to register a final
st against the rule which gives supreme authority to
ecisions of the federal court in such cases, while ac-
cing somewhat reluctantly, not to say sullenly, in the

mpstead v. Reed, 6 Conn. 480.

e Sandusky City Bank v. Wilbor, 7 Ohio St. 481; Skelly v.
on Branch Bank of Ohio, 9 Ohio St. 606; Jefferson Branch
v. Skelly, 1 Black, 436, 17 L. Ed. 173; Dodge v. Woolsey, 18
331, 15 L. Ed. 401; Piqua Branch of State Bank v. Knoop, 16
369, 14 L. Ed. 977; Mechanics' & T. Bank v. Debolt, 18 How.
L. Ed. 458; Mechanics' & T. Bank v. Thomas, 18 How. 384, 15
460.

application of the rule to the case before it, on grounds
expediency only. The question was as to the validity o
state statute which required foreign corporations, befo
transacting any business within the state, to waive th
right to remove from the state courts to the federal cou
cases to which they might be parties. The state court h
held this statute valid. The Supreme Court of the Unit
States had pronounced it void. When the question w
again presented to the Supreme Court of Ohio, it express
its full approval of its own previous decision, but noted t
fact of a contrary decision by the United States Supre
Court, and said: "We recognize that court as the tribu
of last resort in cases depending on the question before
While it is true that the decisions of the Supreme Court
the United States, though entitled to the highest respe
do not bind and conclude the judgment of a state co
as the decision of a superior upon an inferior court of t
same system, yet it would practically be useless to adh
to our convictions, unless there were reasons to expect th
the question, when again presented to that court, would
decided differently. We think it advisable, therefore,
follow, though we do not approve, the decision of the S
preme Court of the United States to which we have
ferred." [8] To the same category should also be referred
early decision of the court in California, setting up a po
ical theory which, however plausible on its face, has be
contradicted by the progress of events, by governmen
practice, and by the course of judicial decisions. Starti
with the admitted proposition that the government of
United States is one of delegated powers, the court p
ceeded to argue that the right to decide ultimately up
the extent of the powers granted to the national gove
ment had not been delegated to the United States, nor p

[8] Railway Passenger Assur. Co. of Hartford v. Pierce, 27 O
St. 155. It is proper to add, however, that one of the judges p
tively dissented from so much of the decision in this case as m
the reason for following the decision of the supreme federal c
one of mere expediency, and stated that he considered its deci
to be "authoritative."

to the states, and that it was therefore preserved
states by the provisions of the tenth amendment to
stitution, and hence it was concluded that the de-
of the Supreme Court of the United States on such
ns were not binding on the state courts.[9]

nd Applications of Rule

rule under consideration is not technically limited,
pplication, to the particular cases in which the judg-
f the highest court of a state may be reviewed and
d by the Supreme Court of the United States; yet
ecification of cases in the twenty-fifth section of
liciary Act of 1789 is pretty nearly broad enough to
ut its boundaries. The rule is most frequently ap-
cases involving the validity or the interpretation of
Congress, or involving the validity of state laws,
ed by their conformity or repugnance to the provi-
f the federal constitution, both of which cases will
rately considered hereafter. But it is important not
sight of the fact that it applies equally to decisions
Supreme Court of the United States upon questions
under treaties, or concerning rights asserted or
made directly under the Constitution of the United
or matters regulated by the rules and procedure of
eral courts. Thus, for example, a decision of the
e Court of the United States adjusting titles to pub-
s in Louisiana, under the treaty of annexation, are
upon, and will be followed by, the state courts of
na.[10] So, in criminal cases, where the defendant
that he has been deprived, by the rulings or prac-
the state courts, of rights and privileges guarantied
by the fourteenth amendment, as, for instance, in
to the composition of the grand or petit jury or his
o challenge the jurors, the decision of the supreme
court upon the question is final and binding on the
ourts, not only in the particular case, but in all
imilar cases where the same claim or demand is

s v. Coover, 11 Cal. 175.

talba v. Copland, 3 La. Ann. 86; Purvis v. Harmanson, 4
421.

interposed.[11] So again, it has been ruled that the ques
of former jeopardy in a capital case is a federal ques
and the Supreme Court of the United States having
cided that, when a court discharged a disagreeing jur
such a case, the defendant was not again put into jeop
on a new trial, that decision is binding on the state cour
So, in an action to determine the liability of a United St
marshal and his sureties on his official bond for a tres
alleged to have been committed by the marshal in his
cial capacity, the decisions of the United States Supr
Court are binding on the state courts.[13] And in an ac
in a state court on an injunction bond given in a Ur
States court, the rule of the federal courts that counsel
are not admissible as an element of damages preva
It is said also that the construction and interpretatio
the federal constitution by the Supreme Court are b
ing on a jury no less than on the court.[15] Nor should
omit to notice the very important corollary to the rule
der consideration, that the United States Supreme C
has the complete and final authority to decide what c
do arise under the Constitution, laws, or treaties of
United States, in other words, to determine wheth
given legal question is a "federal question" or not.[16]

Foreign and Interstate Commerce

It is the prerogative of the United States Supreme C
to place a final and authoritative interpretation upon
clause of the constitution which gives to Congress
power to "regulate commerce with foreign nations,
among the several states, and with the Indian tribes,"
to decide, as cases are severally brought before it,

[11] Kipper v. State, 42 Tex. Cr. R. 613, 62 S. W. 420; H
State, 89 Miss. 23, 42 South. 380.

[12] State v. Keerl, 33 Mont. 501, 85 Pac. 862.

[13] McKee v. Brooks, 64 Tex. 255.

[14] National Society of United States, Daughters of 1812, v. A
ican Surety Co. of New York, 56 Misc. Rep. 627, 107 N. Y.
820.

[15] United States v. Shive, Baldw. 510, Fed. Cas. No. 16,278.

[16] Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221
S. W. 1087.

alidity and applicability of both acts of Congress and
e legislatures of the states, considered with reference
is provision. The cases in which a federal question of
kind may be presented may be roughly divided into
classes or categories. First, cases involving the ques-
whether or not a given transaction, operation, or kind
siness constitutes foreign or interstate commerce, in
sense as to be within the regulative control of Con-
or beyond the control or interference of the states.
n the Supreme Court of the United States has decided
nt of this kind, its determination is absolutely binding
l other courts, whether state or federal, and must be
ted and followed in all subsequent cases in the courts
her system which present the same essential facts.[17]
ıd, cases where the question is upon the validity or
onstruction of an act of Congress passed in the exer-
of the power committed to it by the constitution.
a decision of the supreme federal tribunal for or
st the constitutionality of the statute, or interpreting
pplying its terms, is binding not only on the inferior
al courts and on the other branches of the federal
rnment, but also on all the courts of the various states,
annot be controverted by their subsequent decisions.[18]
l, cases involving the question whether or not a state
te or a municipal ordinance is an encroachment upon
ower and authority vested in Congress by this provi-
of the constitution, or is an unlawful interference with,
straint upon, that commerce which is under the regu-
control of the national government. The taxing laws
e various states, those dealing with railroads and other
ers, and those enacted under the guise of police regu-
ıs for the protection of the public health and safety,

tate v. Eckenrode, 148 Iowa, 173, 127 N. W. 56; International Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922; Shelby Fuel Co. v. Southern Ry. Co., 147 N. C. 66, 60 S. E. 721; & N. O. R. Co. v. Sabine Tram Co. (Tex. Civ. App.) 121 S. 3; Wilcox v. People, 46 Colo. 382, 104 Pac. 408.

rinkmeier v. Missouri Pac. Ry. Co., 81 Kan. 101, 105 Pac. Gutierrez v. El Paso & N. E. R. Co., 102 Tex. 378, 117 S. W.

have been specially fruitful in raising questions of this ki
many of them very close and difficult. But the charac
or subject of the law or ordinance is immaterial. Whe
ever its validity under the federal constitution has be
fairly presented to and decided by the Supreme Court, t
adjudication is final, and is imperatively binding on
state courts in all similar cases.[19]

Obligation of Contracts

Another very important clause of the federal consti
tion, and which has given rise to much litigation, is th
which forbids the states to "pass any law impairing the o
ligation of contracts." The question whether or not a giv
state statute, constitutional provision, or municipal or
nance, impairs the obligation of a contract,—including t
questions whether a given state of facts establishes or
cludes a contract, what classes of contracts are protect
by the constitution, what constitutes the obligation of
contract, and what amounts to an "impairment" of th
obligation,—is a federal question, to be finally determin
by the United States Supreme Court, and the doctrine
now settled (notwithstanding some early dissent, as w
appear from the previous part of this section) that its d
cision of such a question is unimpeachable in the sta
courts and must be followed by them in all similar cases
As remarked by the court in Kentucky: "In determini
this question we feel constrained to follow the decisions
the Supreme Court, because the clause of the federal co
stitution prohibiting the states from enacting laws impa
ing the obligation of contracts is directly involved, a
there should be no reluctance in state courts, even if diff

[19] People ex rel. Pennsylvania R. Co. v. Wemple, 138 N. Y.
33 N. E. 720, 19 L. R. A. 694; Spratlin v. St. Louis Southwest
Ry. Co., 76 Ark. 82, 88 S. W. 836; St. Louis, I. M. & S. Ry.
v. State, 85 Ark. 284, 107 S. W. 989; Louisville & N. R. Co.
Commonwealth, 126 Ky. 279, 103 S. W. 349, 31 Ky. Law Rep. 6
State v. Glasby, 50 Wash. 598, 97 Pac. 734, 21 L. R. A. (N. S.) 7
Reid & Beam v. Southern Ry. Co., 150 N. C. 753, 64 S. E. 874.

[20] Kelly v. Gwatkin, 108 Va. 6, 60 S. E. 749; Einstein v. Rarit
Woolen Mills, 74 N. J. Eq. 624, 70 Atl. 295; Pennsylvania R.
v. Duncan, 111 Pa. 352, 5 Atl. 742.

ews were entertained, in following the decisions of ghest judicial tribunal of the country, that must ulti- determine all such questions." [21]

rocess of Law

ally conclusive and binding on the courts of the sev- ates are the decisions of the United States Supreme upon the question what constitutes "due process of and whether or not the operation of state laws or ipal ordinances, or the administration of civil and al justice in the state courts, or the action of execu- oards and officers, has the effect of depriving the citi- life, liberty, or property contrary to the law of the

ents from Other States

er the explicit provisions of the federal constitution, aith and credit shall be given in each state to the acts, records, and judicial proceedings of every other The construction of this clause involves a federal on, and its interpretation by the Supreme Court of nited States is controlling, so that all state courts, on lar state of facts, are bound to follow its decision as ther full faith and credit have been given, for example, udgment of a court of one state when pleaded or sued the courts of another state.[23] It is a matter of his- interest, in this connection, that in the early years he adoption of the constitution there was great con- and uncertainty among the highest state courts as to eaning and effect of this provision, and that the ques- arising under it were settled by the Supreme Court United States in a leading decision, which has ever

mmonwealth v. Covington & C. Bridge Co., 21 S. W. 1042. dson v. Wright, 164 Ala. 298, 51 South. 389, 137 Am. St. ; Liddell v. Landau, 87 Ark. 438, 112 S. W. 1085; Seaboard e Ry. v. Simon, 56 Fla. 545, 47 South. 1001, 20 L. R. A. (N. S.) arrette v. Whitney, 36 Utah, 574, 106 Pac. 522.

Vall v. De Vall (Or.) 109 Pac. 755; Missouri, K. & T. Ry. Texas v. Swartz, 53 Tex. Civ. App. 389, 115 S. W. 275; minion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. N. E. 193; Johnston v. Mutual Reserve Life Ins. Co., 43 ep. 251, 87 N. Y. Supp. 438.

since been accepted and followed in all the states witho
any important opposition or demur.[24]

No Decision by United States Supreme Court

When a federal question arises in a state court, and
direct adjudication upon the precise point has yet be
made by the Supreme Court of the United States, the co
is of course at liberty, and it is its duty, to determine
question by the exercise of its own judgment, enlighten
by the best available authorities.[25] Thus, if the questi
concerns the validity of a state statute, which is assail
on the ground of an alleged repugnance to the federal c
stitution or an act of Congress, and no decision of the
preme federal court is shown upon the constitutionality
the same or a similar statute, the state court is without
direct precedent and will base its ruling on its own judic
conviction as to the validity of the statute, calling in aid
necessary, decisions of other state courts of last resort, or
the inferior federal courts, upon similar laws.[26] It m
sometimes happen that, although the precise point has
been before the Supreme Court of the United States,
suggestions and indications of its probable future course
decisions can be gathered from opinions already render
or that there is a manifest and progressive tendency
wards a certain point in the course of its previous adju
cations, so that it may be possible to forecast, with reas
able confidence, what its decision would be if the spec
point now in issue were presented for its determinati
In this case, a state court of last resort might very w
conform its ruling to the point of view indicated, especia
if its own convictions tended in the same direction.
mere dicta of the Supreme Court, especially if not c
sistent or harmonious, possess no binding force.

[24] See 2 Black, Judgm. §§ 855, 856.

[25] Atlantic Works v. Tug Glide, 157 Mass. 525, 33 N. E. 163,
Am. St. Rep. 305.

[26] McDowell v. Lindsay, 213 Pa. 591, 63 Atl. 130; Stoddart
Smith, 5 Bin. (Pa.) 355.

VALIDITY AND CONSTRUCTION OF ACTS OF CONGRESS

106. A decision of the United States Supreme Court sustaining or denying the constitutional validity of an act of Congress, or construing or interpreting such a statute, is imperatively binding on the state courts as a precedent for the determination of all similar questions arising under the same statute.

A federal question is presented whenever the issue in an action involves the validity of an act of Congress, or its construction or interpretation, or its application to a given state of facts. Of all such questions the Supreme Court of the United States is the final arbiter, and its decision must be accepted as final and as closing the door against any further examination of the same question in the courts of the various states, however it may run counter to their own previous opinions, and even though it is directly contrary to their own previous adjudications.[27]

[27] Snead v. Central of Georgia R. Co. (C. C.) 151 Fed. 608; Merchants' Laclede Bank of St. Louis, Mo., v. Troy Grocery, 144 Ala. 305, 39 South. 476; Clews v. Mumford, 78 Ga. 476, 3 S. E. 267; McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122; Chicago & A. Ry. Co. v. Walters, 120 Ill. App. 152; First Nat. Bank of Richmond v. Turner, 154 Ind. 456, 57 N. E. 110; Western Union Tel. Co. v. State ex rel. Hammond Elevator Co., 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153; Commonwealth v. Morrison, 2 A. K. Marsh. (Ky.) 75; Moore v. Allen, 3 J. J. Marsh. (Ky.) 612; State, to Use of Charity Hospital of New Orleans, v. Fullerton, 7 Rob. (La.) 219; State v. Intoxicating Liquors, 102 Me. 385, 67 Atl. 312, 120 Am. St. Rep. 504; In re Sims, 7 Cush. (Mass.) 285; Lyon v. Clark, 124 Mich. 100, 82 N. W. 1058; Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895; Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 S. W. 1052; Hamilton v. Smith, 36 Mont. 1, 92 Pac. 32, 122 Am. St. Rep. 330; McLucas v. St. Joseph & G. I. R. Co., 67 Neb. 603, 97 N. W. 312; Bressler v. Wayne County, 25 Neb. 468, 41 N. W. 356; Nash v. McNamara, 30 Nev. 114, 93 Pac. 405, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56; American Ins. Co. v. Fisk, 1 Paige (N. Y.) 90; Harris v. Jex, 55 N. Y. 421, 14 Am. Rep. 285; Board of Trustees v. Cuppett, 52 Ohio St. 567, 40 N. E. 792; First Nat. Bank of

Though this rule is now firmly established, as may b
seen from the case above cited, yet it was not at first uni
versally conceded, nor was it accepted without some opposi
tion. Thus the Supreme Court of Ohio once very strongl
hinted that, in the case of an act of Congress which shoul
appear to it to be in very plain or gross violation of th
federal constitution, it would not consider itself bound t
accept or follow a decision of the Supreme Court of th
United States upholding the validity of the statute. But
added that nothing but an overwhelming necessity coul
justify a state court in the semi-revolutionary act of settin
aside or disregarding such a decision of the United State
Supreme Court.[28] So, the New York Court of Appeals ap
parently draws a distinction between those cases which ar
reviewable on error by the United States Supreme Cour
and those which are not, and declares that in a case wher
it has ultimate jurisdiction, that is, a case not so review
able, it will adopt the construction put upon an act o
Congress by the supreme federal court, but on principle
of comity rather than of obligation.[29] Elsewhere, howeve
the decision of the highest federal court is accepted as fina
in all cases which concern either the validity or the con
struction of an act of congressional legislation; and it
said that not only its application of such a statute to th
given state of facts, but also its definition of the word
contained in the statute is binding upon the state courts.
But in the case of an act of Congress which has not ye
been passed upon by the Supreme Court, the state court

Wellington v. Chapman, 9 Ohio Cir. Ct. R. 79; In re Brophy,
Ohio Dec. 391; Lee v. Citizens' Bank, 5 Ohio Dec. 21; Burwe
v. Burgess, 32 Grat. (Va.) 472. The question of the liability of
surety on an injunction bond given in a suit in a federal cou
pursuant to federal statutes, is governed by the principles appli
by the federal courts in such cases, and not by the state law. Un
bre.t v. American Bonding Co. of Baltimore, 144 Wis. 611, 129 N. W
788.

[28] Ex parte Bushnell, 9 Ohio St. 77.

[29] York v. Conde, 147 N. Y. 486, 42 N. E. 193.

[30] Commonwealth v. People's Express Co., 201 Mass. 564, 88
E. 420, 131 Am. St. Rep. 416.

of course at liberty to hear argument against its con-
tional validity, and to decide the question according
eir own judgment.[31] So also, where a state court has
decided for itself, after full consideration, the proper
truction to be placed on an act of Congress, such, for
nce, as the bankruptcy act, and the decisions of the
us federal courts on the question are in conflict, the
iple of stare decisis requires the state court to adhere
e rule laid down, and especially is this the case if the
t utterances of the United States Supreme Court, with-
expressly deciding it, lend support to that view of the
e

rations and Applications of Rule

was settled by the decisions of the Supreme Court of
United States, at an early day, that the bankruptcy
te then in force was valid and constitutional, and ac-
ngly the state courts, recognizing the ultimate juris-
on of the federal courts over that question, refused to
argument against the constitutionality of the law, and
the benefit of it in all proper cases to persons who
ght themselves within its terms.[33] Further, as to the
ruction and interpretation of this statute, the rules
down by the highest federal court will be accepted
followed implicitly whenever a question arises in a
court concerning the meaning or application of the
So also as to the public land laws of the United
s. It is for the federal courts finally to determine
meaning and effect, and the conclusions which they
reached and announced will be accepted as authorita-
nterpretations and will be followed by the state courts

lack, Const. Law (3d Ed.) 62.
tuart v. Farmers' Bank of Cuba City, 137 Wis. 66, 117 N.
0.
eene v. Mould, 16 Ohio, 12.
ugely v. Robinson, 19 Ala. 404; Burnham v. Ft. Dodge Gro-
Co., 144 Iowa, 577, 123 N. W. 220; Stewart v. Hoffman, 31
184, 81 Pac. 3; Mount v. Manhattan Co., 41 N. J. Eq. 211,
726; Wagner v. Burnham, 224 Pa. 586, 73 Atl. 990; Ferrell
digan, 76 Va. 195; Bank of Garrison v. Malley (Tex.) 131 S.
64.

whenever questions arise under those laws, as, for exampl in regard to the jurisdiction and authority of the office of the land office and the effect of a patent from the gover ment as precluding further inquiry into the facts and pr ceedings on which it was based,[35] or as to the questio whether a state statute of limitations runs against a settl on the public lands before the issuance of a patent to him, or as to the rights of a surviving husband or wife wi reference to a homestead entry under the public land laws, or concerning the extent of the rights or titles which pa under a federal grant of lands.[38] So again, the decisions the federal courts will be followed by the state courts regard to the construction of the national banking act. And the extent of the rights and powers of a national ba under this statute is essentially a question for the dete mination of the United States courts; and whatever rul may obtain in the several states as to the powers of co porations under such statutes, all state courts must yie to the decisions of the Supreme Court of the United Stat construing and defining the powers of the national bankin associations.[40] For another illustration we may mentio the subject of foreign and interstate extradition. The d cisions of the United States Supreme Court construing th provision of the Constitution in relation to this matter, a

[35] Poire v. Wells, 6 Colo. 406.

[36] Slaght v. Northern Pac. Ry. Co., 39 Wash. 576, 81 Pac. 1062.

[37] Hall v. Hall, 41 Wash. 186, 83 Pac. 108, 111 Am. St. Rep. 101 Cunningham v. Krutz, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. 967.

[38] Washougal & L. Transp. Co. v. Dalles, P. & A. Nav. Co., Wash. 490, 68 Pac. 74. And see Street v. Delta Min. Co., 42 Mo 371, 112 Pac. 701.

[39] Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190.

[40] First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 W. 1059; First Nat. Bank of Aberdeen v. Andrews, 7 Wash. 261, Pac. 913, 38 Am. St. Rep. 885. But see Security Nat. Bank St. Croix Power Co., 117 Wis. 211, 94 N. W. 74, where it is sa that, while a state court is bound by the decisions of the Unit States Supreme Court as to the powers of the national banks, y the application of such decisions as to the powers of such a ba as a defense in a case properly brought in the state courts, to be determined by state decisions.

preting the acts of Congress passed in pursuance there-
nd deciding, for example, what constitutes a fugitive
justice, are controlling on the state courts and to be
ved as binding precedents.[41] And so, without going
further detail, the rule which makes the determination
e validity of acts of Congress and their interpretation
tially a matter of federal cognizance, and obliges the
courts to abide by the decisions of the federal su-
e court, has been applied to questions arising upon
constitutionality and effect of the legal-tender acts
ngress;[42] to questions arising under the statutes reg-
ng the grant of patents for inventions,[43] and under
relating to trade-marks;[44] to decisions under the
nerce clause of the Constitution, and construing the
us acts which have been passed by Congress with
ence to that important subject;[45] to adjudications up-
ne validity and meaning of the laws authorizing the
val of causes from state courts to the federal courts;[46]
terpretations of the navigation laws and the statutory
ations enacted by Congress to prevent collisions at
[47] to the construction placed by the Supreme Court
e United States upon the provisions of the national
ng law relating to usury;[48] to a decision as to the
ence of the stamp tax imposed by the war revenue act

ennison v. Christian, 196 U. S. 637, 25 Sup. Ct. 795, 49 L.
0; In re Letcher, 145 Cal. 563, 79 Pac. 65.
lack v. Lusk, 69 Ill. 70; Barringer v. Fisher, 45 Miss. 200;
an v. Darcy, 5 Rich. (S. C.) 125; Kellogg v. Page, 44 Vt. 356,
Rep. 383; Townsend v. Jennison, 44 Vt. 315; Baldwin v.
121 Mich. 259, 80 N. W. 36.
ilmore v. Sapp, 100 Ill. 297.
legert v. Abbott, 61 Md. 276, 48 Am. Rep. 101.
rinkmeier v. Missouri Pac. Ry. Co., 81 Kan. 101, 105 Pac.
Gutierrez v. El Paso & N. E. R. Co., 102 Tex. 378, 117 S. W.
Gibson v. Atlantic Coast Line R. Co., 88 S. C. 360, 70 S. E.

linger's Adm'x v. Chesapeake & O. Ry. Co., 138 Ky. 615, 128
1055.
hesley v. Nantasket Beach Steamboat Co., 179 Mass. 469, 61
50.
laseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895.

of 1898;[49] and to the question whether an appeal to t
United States Supreme Court operates as a supersedeas
the judgment.[50]

JURISDICTION AND POWERS OF FEDERAL COURTS

107. On questions relating to the jurisdiction, powers, a procedure of the various federal courts, the de sions of those courts, and particularly of the S preme Court of the United States, are binding a conclusive on the state courts.

The jurisdiction of the courts of the United States
outlined in the third article of the Constitution, and
further defined and prescribed by various acts of Congres
and their powers and procedure have also been the subje
of regulation by congressional legislation. Hence any qu
tion as to the organization, jurisdiction, or authority of o
of these courts is a "federal question," since its soluti
necessarily involves a construction of either the provisio
of the Constitution or of an act of Congress. Under t
general rule, therefore, that the interpretation of fede
law is the peculiar function of federal courts and that th
pronouncements thereon are of paramount authority, it f
lows that decisions of the United States courts, but esp
cially of the Supreme Court, concerning the jurisdicti
and powers of the federal judiciary are controlling on t
state courts and preclude further inquiry into the issu
which they adjudicate.[51] Thus, it is conceded by the cou
of the states (whatever hesitation or demur there may ha
been at first) that the constitutionality of that provision
the Judiciary Act of 1789 which authorizes writs of er
from the Supreme Court of the United States to the hig

[49] United States Express Co. v. People ex rel. Western Wh
Works, 195 Ill. 155, 62 N. E. 825.

[50] North Shore Boom & Driving Co. v. Nicomen Boom Co.,
Wash. 564, 101 Pac. 48.

[51] Feusler v. Lammon, 6 Nev. 209; Clark v. Wolf, 29 Iowa, 1

ourts of the states in certain cases has been fully and
y settled by the decisions of the court of highest au-
ty.[52] But when we speak of questions as to the juris-
on of the federal courts, it must of course be under-
l that questions of law are intended. Aside from a pos-
question of law, jurisdiction in any particular case
nds upon the concurrence of certain facts, as, for in-
e, in the federal courts, the citizenship of the parties,
mount in controversy, or the service of process. And
udgment of a federal court in a given case does not pre-
a state court from inquiring into the subject of its
diction, in so far as the same may depend on matters
ct. For instance, the state courts have power to de-
ine whether a district court of the United States, sit-
as a court of admiralty, and deciding a question of
, had jurisdiction of the subject-matter so as to render
udgment conclusive on the same point arising inci-
lly in the state courts.[53] So also, a state court, in
mining the question whether a cause pending before it
movable to the federal court, under the act of Con-
in that behalf, will be controlled by a decision of
Supreme Court of the United States, if any, on the
point.[54] And so also, a state court, in determining
hat extent a judgment of a circuit court of the United
s operates as a lien, must be governed by the federal
ions.[55]

erris v. Coover, 11 Cal. 175.
locum v. Wheeler, 1 Conn. 429. And see, more fully, 2 Black,
. § 939.
exas & P. Ry. Co. v. Huber, 100 Tex. 1, 92 S. W. 832.
ock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E.
64 Am. St. Rep. 137.

INTERPRETATION AND APPLICATION OF F
ERAL DECISIONS

108. The controlling effect on the state courts of a deci of the Supreme Court of the United States, e cially where contrary to the previous doctrin the state courts, will be confined to the pre points or questions expressly decided or neces ly implied in the decision, excluding dicta and eral expressions of opinion, and need not be tended by analogy to like but not identical ca neither is a state court bound to overrule its previous decisions in anticipation of probable ture decisions of the federal court.

A decision of the Supreme Court of the United State a case taken up to it on writ of error from the cour last resort of a state is binding and final, not only as tween the parties and upon the court so far as conc that particular litigation, but in all subsequent cases b on essentially the same facts and involving the same q tion. This rule has been more explicitly stated by the preme Court of Missouri as follows: A case in a state preme court being presented in a form such that the Un States Supreme Court would have jurisdiction to deci constitutional question raised therein, the principles nounced by that court in a similar case furnish a rul govern as well as to guide, and its adjudication mus treated as decisive of the proposition as applied to the ject in question.[56] This principle was not at first uni sally conceded. Even in relation to the effect of a deci of the supreme federal court in the very litigation in w it was rendered, and as governing the further proceed in the same action in the state courts, attempts were o sionally made, in the early days, to circumscribe it wi the narrowest possible limits. This is shown in a cas

[56] State v. Miksicek, 225 Mo. 561, 125 S. W. 507, 135 Am Rep. 597.

York, where it appeared that a judgment of the Su-
e Court of that state was taken by writ of error to the
t for the Correction of Errors (then the highest court
e state) and was there affirmed. The case was then
to the Supreme Court of the United States, on the
ntion that the defendant was a consul of a foreign na-
nd had been denied the rights secured to him in that
ity by the Constitution and laws of the United States.
the Supreme Court of the United States found to be
and accordingly reversed the judgment of the New
Court of Errors, and sent the case back with a man-
or further proceedings in accordance with its opinion.
ne filing of the mandate, it was held by the Court for
orrection of Errors that, although it was bound to re-
the judgment rendered by itself, yet it was not ob-
to reverse the judgment of the court below, and
fore, while it reversed its own judgment, it also dis-
d the writ of error by which the case had been brought
e it, thus practically affirming the original judgment of
upreme Court of New York, and depriving the de-
nt of all benefit of his appeal to the United States Su-
e Court.[57] Also in a comparatively late case in Lou-
, it was declared that a state supreme court, in fol-
g instructions to render a decree so as to conform to
inion of the United States Supreme Court, is not ob-
to render a judgment militating with the established
of the jurisprudence of the state courts.[58]

although such narrowness of interpretation, and such
dging conformity to the authoritative declarations of
upreme federal court, are neither tenable in law nor
ted in modern practice, yet it is a fair and salutary
hat the courts of the several states will consider
elves bound only as regards the questions actually
ecessarily decided by the Supreme Court, or, in other
, only as to the propositions of law emerging from the
of the particular case and positively announced by the
being either essential to its determination or neces-

avis v. Packard, 10 Wend. 50.
urphy v. Factors' & Traders' Ins. Co., 36 La. Ann. 953.

sarily implied in the judgment which was given.[59] I instance, there is no obligation on the state court to quiesce in any mere dicta or general expressions of opini which may fall from the Supreme Court of the Uni States in the course of its judgment.[60] So also, where cisions are rendered in the federal courts, even in the hi est, which are contrary to the previous course of decisi in the highest court of a state, the latter court will not f itself bound to extend the principles of those federal de sions, by analogy, to other cases which, though resembl those adjudicated, are not identical with them, nor to ov turn its previous decisions, in anticipation of the Uni States courts, but will confine itself to the point or poi actually decided.[61] This is illustrated by a decision of Supreme Judicial Court of Massachusetts, in which cog zance was taken of the decision of the Supreme Court the United States in relation to the right of the states regulate the traffic in intoxicating liquors, when the sa had been imported from other states and remained in original packages (Leisy v. Hardin, 135 U. S. 100, 10 S Ct. 681, 34 L. Ed. 128), and in which the state attempted apply the principles of that decision to the case of oleom garine. Said the court: "We wish and are bound to c form to that decision and to adopt the change which it made in the law as heretofore understood in this comm wealth, to the extent that the decision goes, either in expr terms or by necessary implication. If, however, any furt step is to be taken in that direction, it is better that it sho be done by the tribunal which can declare and settle the for all the states alike, than for us to make a decision sanctioned by our own convictions, and perhaps not quired by the views of constitutional rights and obligati entertained by the tribunal of last resort." [62] So it has b

[59] State v. Neal, 42 Mo. 119; City of Paterson v. East Je Water Co., 74 N. J. Eq. 49, 70 Atl. 472.

[60] Mayor, etc., of City of Baltimore v. Baltimore & O. R. Co Gill (Md.) 288, 48 Am. Dec. 531.

[61] North River Steamboat Co. v. Livingston, 3 Cow. (N. Y.)

[62] Commonwealth v. Huntley, 156 Mass. 236, 30 N. E. 1127 L. R. A. 839.

y the Supreme Court of Maine that, while the ques-
s to whether a state statute is in contravention of
deral constitution is finally determinable by the feder-
reme court, yet the state court will not hold, against
n judgment, that a statute of the state is in violation
provisions of that constitution until it has been so
d, although it may be possible, judging from re-
made in certain opinions of the Supreme Court of
nited States, that its decision sustaining the statute
e overruled by the federal tribunal.[63]

s possible also that a state court may misapprehend
ırport of a decision of the supreme federal court, or
construction upon it not in accordance with an ex-
ion of its meaning and effect afterwards given by
urt which rendered it. In that case, it is the duty of
ate court to abandon its former views, and accept as
itative not only the decision but also the official in-
tation of it. Thus, it is said in Tennessee that a for-
udgment of the highest court of that state, holding
certain bank was exempt from general taxation under
arter, which decision was made in conformity to a
of the United States Supreme Court, as understood
courts of Tennessee, is not conclusive in subsequent
ion, when the supreme federal court has placed a dif-
construction on its former holding and decided the
ılar question in the contrary way.[64]

e the judgments of the supreme federal tribunal, on
l questions, settle the law for all the states alike, it
essential to the binding force of a decision of that
when urged as a controlling authority in the courts
state, that the case in which it was rendered should
originated in that state. It is well known that the
on of the highest court of any given state is not con-
e, nor anything more than a merely persuasive au-
y, when cited in the highest court of another state,
ı the two cases may involve precisely the same ques-

ate v. Intoxicating Liquors, 95 Me. 140, 49 Atl. 670.
ion & Planters' Bank v. City of Memphis, 101 Tenn. 154,
V. 557.

tion of constitutional law. But the Supreme Court of United States, when it sends its writ of error to the high court of a state and reviews the judgment of that court, settles a question arising under the federal constitution laws, does not act as a part of the judicial machinery that particular state, in such sense that its judgment be treated as inconclusive in the courts of another st On the contrary, it is to be regarded (within this special limited field) as a tribunal having supreme appellate ju diction over all the courts of last resort in all the sta equally and alike. And therefore its decision on a ques of federal constitutional law is to be received and follo by the courts of final resort in all the states alike, jus a decision of the supreme court of a state is accepted followed by all the intermediate and inferior courts of state. Hence, for example, the decision of the Supr Court of the United States that a statute of a state is for conflict with certain provisions of the federal const tion, should be accepted as binding and conclusive w the same constitutional objection is urged against a sim statute in a different state.[65] But we must be carefu distinguish between questions concerning the validity statute and questions concerning its construction. I the rule of the United States Supreme Court that it accept and follow the construction of a state statute by highest court of the state. Hence a decision of the fed court upon the effect of a statute of a given state, as, instance, that it permits the maintenance of an action u certain circumstances, is not conclusive evidence of meaning and effect of a similar statute in another state, does it require the courts of the latter state to over their own previous decisions to the contrary.[66] For it be observed that, in this case, there is no federal ques decided, and further that the determination of the supr federal court, merely accepting the construction preva

[65] Ex parte Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. 901; Commonwealth v. Atlantic Coast Line R. Co., 106 Va. 6 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983.

[66] Guianios v. De Camp Coal Min. Co., 242 Ill. 278, 89 N. E.

state where the statute was enacted, adds nothing in espect to the force of the decisions made in that state, , as already stated, would not be controlling in other .

STIONS OF GENERAL JURISPRUDENCE OR LOCAL LAW

Decisions of the Supreme Court of the United States upon questions of local law, or questions arising out of the common law or the application of general principles of jurisprudence, or on matters of procedure or practice, not involving a federal question, though entitled to respectful consideration in the courts of the various states, are not of controlling authority in state courts, except in the particular litigation in which rendered.

rt from questions arising under the constitution or of the United States, and in the wide field of general rudence, having to do with rights of persons and rty and contracts, the jurisdiction and procedure of urts, and the general principles for the administra- f justice at common law and in equity, the decisions e United States Supreme Court are entitled in all to the highest and most respectful consideration, as the pronouncements of a most eminent and learned al. In the inferior courts of the federal system they controlling authority, whatever be the subject-matter. the courts of the various states, in such matters as the determinations of that court are not binding prec- in such sense that there is a judicial duty to follow or in such sense as to require the reversal of previous s to the contrary. In case of a conflict of opinion on rs of general law, the inferior courts of a state will the decisions of the highest court of the state, and tter court will follow its own previous adjudications, without being bound by the authority of the supreme

federal court.[67] This rule may be illustrated by a few qu
tations from opinions of various state courts. "The dec
sions of that court [the Supreme Court of the Unit
States] are entitled to great consideration; and in all cas
which can be reviewed in that court, its judgments mu
be regarded as binding on all other judicial tribunals in o
country; but in other cases, the opinions of that court a
entitled to the same respect, and no other, that is due
the opinions of any other court composed of judges of equ
learning and ability." [68] "While we entertain a proper r
spect for the opinions of the Supreme Court [of the Unit
States] and are willing to yield to them the deference whi
is due to so distinguished a tribunal, yet when its decisio
come in conflict with those of this court in relation to que
tions over which the jurisdiction of this court is ample a
its decisions final, we feel bound to adhere to our own d
cisions." [69] "The peer of this court is the Supreme Cou
of the United States. Its decisions upon questions arisi
out of the federal constitution and federal statutes are bin
ing on us; but so, on the other hand, our decisions up
questions arising out of our state constitution and our sta
statutes are binding upon it. At the same time, upon th
wide domain which is presented by general jurisprudenc
the federal supreme court and the state supreme court ho
an equal and divided jurisdiction. Our opinions are n
binding upon it, nor its opinions upon us." [70] "As betwe
the judgments of our own courts and those of the gener
government, where there is a conflict between them, v
ought to follow our own decisions, except in cases arisi

[67] Baldy v. Hunter, 98 Ga. 170, 25 S. E. 416; Bailey v. Fi
Gerald, 56 Miss. 578; Merchants' & Miners' Transp. Co. v. Borla
53 N. J. Eq. 282, 31 Atl. 272; Lyon v. Mitchell, 36 N. Y. 235,
Am. Dec. 502; Stalker v. McDonald, 6 Hill (N. Y.) 93, 40 A
Dec. 389; Towle v. Forney, 14 N. Y. 423; Lebanon Bank
Mangan, 28 Pa. 452; Southern Pac. Co. v. Allen, 48 Tex. C
App. 66, 106 S. W. 441; McElvain v. St. Louis & S. F. R. Co., 1
Mo. App. 126, 131 S. W. 736; Sullivan-Sanford Lumber Co.
Watson (Tex. Civ. App.) 135 S. W. 635.

[68] Marfield v. Goodhue, 3 N. Y. 62, 71.

[69] Shelton v. Hamilton, 23 Miss. 498, 57 Am. Dec. 149.

[70] Franklin v. Kelley, 2 Neb. 84.

r the constitution and laws of the Union, where the
ments of the Supreme Court of the United States are
ontrolling authority. In cases in which the federal
s acquire jurisdiction on account of the character or
ence of the parties, such courts assume to administer
aw of the state in which the matter arose, and where
ction relates to titles to real estate, the law of the
within which the real estate is situated. Thus the
rules of property existing in New York are those
ribed by the laws of New York, and such laws are the
whether they are administered by the courts of the
or by the courts of the nation. There is no national
or system of laws respecting private property. The
nsing of private justice between individuals is in gen-
matter of state concern. It is only in a few excep-
cases that the courts of the United States can be
upon to act. Where the United States, as a political
ration, is a plaintiff, where an alien is a party, and
the action is between a citizen of the state within
the action is brought and a citizen of another state,
rrent jurisdiction is, from motives of policy and con-
nce, conferred upon the federal courts. In these ex-
nal cases, of comparatively infrequent occurrence,
eneral government undertakes, through its courts, to
nister the state laws. As evidence of these laws, it
urse receives the state constitution and statutes, and
ljudications of the state courts. If a question is found
ve been settled by the highest appellate court of a
that decision is binding upon the courts of the United
s to the same extent as upon the courts of the state in
it was made. * * * Upon such a question as
he highest court of the Union has no legal pre-emi-
over any of the courts of this state. We listen to the
of its judges with the respect to which their eminent
cter and high position entitle them, but in inquiring
the law of this state upon a particular question is, we
look primarily to the judgments of our own tribunals,
hen we find the point well settled by the decision of
ghest state court, we cannot do otherwise then follow

that decision, notwithstanding the Supreme Court of
United States has taken a different view of the matter.'

To attempt an exhaustive enumeration of the cases
which the state courts will thus hold themselves free fr
the controlling authority of decisions of the United Sta
Supreme Court would be a fruitless as well as an endl
task. But it may be helpful to adduce here some few ill
trations. The rule under consideration has been held to
ply to matters relating to the general administration of j
tice in the courts of the state and to their powers and p
cedure;[72] to a question as to the authority of the trial co
to grant an involuntary nonsuit;[73] to a question concerni
the validity of a sale of land under execution;[74]
the rulings and decisions of the state courts on the quest
of who are fellow-servants, as opposed to the views of
federal courts on the same point;[75] to questions arising
der the local law of real property, such as the extent of
title of a riparian proprietor on an unnavigable lake;[76] a
to a question concerning the right of a common carrier
limit by contract his liability for gross negligence.[77]

But the fact that a decision of the Supreme Court of
United States may not be of controlling authority in
given case in a state court does not mean that it may
possess very high persuasive authority. "We will not f
get," says a territorial supreme court, "that the decisio
of the federal supreme court upon all questions are of
most exalted authority, and should and will be receiv
with the greatest respect, and even reverence, and giv
the most careful consideration."[78] And in fact it is
constant practice of courts in all the states, where th

[71] Towle v. Forney, 14 N. Y. 423.
[72] Platt v. Bonsall, 136 App. Div. 397, 120 N. Y. Supp. 983.
[73] Bryan v. Pinney, 3 Ariz. 34, 21 Pac. 332.
[74] Shelton v. Hamilton, 23 Miss. 496, 57 Am. Dec. 149.
[75] Illinois Cent. R. Co. v. Bentz, 108 Tenn. 670, 69 S. W. 317,
L. R. A. 690, 91 Am. St. Rep. 763.
[76] Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 33 L. R. A. 1
52 Am. St. Rep. 380.
[77] Mynard v. Syracuse, B. & N. Y. R. Co., 7 Hun (N. Y.) 399.
[78] Bryan v. Pinney, 3 Ariz. 34, 21 Pac. 332.

not constrained by previous rulings of their own, and ecially in regard to the vexed and mooted questions of law, to turn to the decisions of the supreme federal rt for guidance and instruction, and to regard an appli-le judgment of that tribunal as the most sure and sat-ctory basis on which to rear a superstructure of doc-al jurisprudence. Thus, for instance, the Court of Ap-ls of New York in a recent case remarked: "Substan-y this doctrine has recently been decided [by the United tes Supreme Court in a case which it cited]. The rea-ing of that case seems to us accurate and decisive, and follow it without hesitation." [79] So the court in North olina, on a question of insurance law, said: "A recent sion in the Supreme Court of the United States is so ct and clear upon the point that it seems wholly need-to search for other authorities in the state courts or he works of elementary writers on the subject." [80] So Supreme Court of Pennsylvania, on a similar question, erves: "When we pass from our own courts to those of ghboring states, we find such difference in the decisions , as authority, they afford us little or no help in the of a definite conclusion. We turn to the federal de-ons. Of these we have two directly in point [citing two sions of the Supreme Court of the United States]. * * These authorities, in connection with our own, ove all hesitation concerning the rectitude of the judg-t of the court below. If, however, the question were of first impression, and to be settled on the ground of lic morality and judicial policy, we could hardly fail to h the same conclusion." [81]

[79] Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.
[80] Hornthal v. Western Ins. Co., 88 N. C. 71.
[81] Gilbert v. Moose's Adm'rs, 104 Pa. 74, 49 Am. Rep. 570.

VALIDITY AND CONSTRUCTION OF STATE STATUTES

110. Where the question concerns the validity of a sta statute, as tested by its conformity or repugnan to the Constitution of the United States or acts Congress or treaties, the decision of the Supren Court of the United States, whether for or again the validity of the statute, is binding and concl sive on the courts of the state.

111. But where the validity of the statute is to be test solely with reference to the constitution of t state, and also where the question is upon its co struction or interpretation, rather than its constit tionality, the final decision lies with the court last resort of the state, and it is not bound to r verse its former rulings in consequence of a co trary decision of the Supreme Court of the Unit States, nor make its future adjudications confor thereto.

Since the question whether a statute law of a state is conflict with any provision of the federal constitution, of an act of Congress or a treaty, is a federal question, a since, as we have already seen, the Supreme Court of t United States is the final judge and unappealable arbit of all such questions, it follows that its decision of a que tion of this kind, whether it be for or against the validi of the statute, is binding and conclusive on the courts that state, and will imperatively require the overruling previous decisions of the state courts to the contrary, a also will furnish an unbending rule for their determinati of the same question in all future cases.[82] This rule

[82] Caldwell v. Armour, 1 Pennewill (Del.) 545, 43 Atl. 517; Smo v. Lafferty, 7 Ill. 383; Breitung v. City of Chicago, 92 Ill. Ap 118; Ballard v. Wiltshire, 28 Ind. 341; McCollum v. McConaugh 141 Iowa, 172, 119 N. W. 539; Paddock v. Missouri Pac. Ry. C 155 Mo. 524, 56 S. W. 453; State v. Great Northern Ry. Co.,

frequently applied in cases where the supreme federal
t adjudges that a state law or ordinance is contrary to
provision of the federal constitution or of an act of
gress, thus destroying its vitality, and perhaps necessi-
g the reversal of former rulings of the state courts in
of its validity. But it holds good equally in the con-
case. That is, if the Supreme Court of the United
s sustains the validity of a statute, as against the ob-
n that it violates the federal constitution, that deci-
is conclusive on the state courts. It would not pre-
inquiry into the validity of the statute, as tested by
particular requirements of the state constitution, dif-
t from those provisions of the federal constitution in
ection with which the statute was considered by the
al court, as, for example, in regard to the manner of
nactment, or as to the necessary correspondence be-
n its title and its subject-matter. But as to all points
ed by the decision of the federal court, the constitu-
lity of the statute must be regarded as established
st any further question in the state courts, and they
conform their future action and rulings thereto.[83]
, for instance, where the supreme federal court has
dered the validity of a municipal ordinance enacted in
xercise of the police power, and has held it to be free
constitutional objection, a bill for an injunction to
nt the enforcement of the ordinance, thereafter
ght in a state court, should be dismissed for want of
y.[84] So where the highest court of a state has pro-
ced against the validity of a statute relating to the
in liquors, on the ground that it is in conflict with
lause of the federal constitution giving to Congress
ower to regulate interstate commerce, but the Su-

370, 116 N. W. 89; Railway Passenger Assur. Co. of Hart-
. Pierce, 27 Ohio St. 155; State v. Smith (Or.) 107 Pac. 980;
v. Hernando Ins. Co., 97 Tenn. 85, 36 S. W. 721; First Nat.
v. City Council of Estherville (Iowa) 129 N. W. 475; State
ffin, 154 N. C. 611, 70 S. E. 292.

tate v. Hernando Ins. Co., 97 Tenn. 85, 36 S. W. 721.

reitung v. City of Chicago, 92 Ill. App. 118.

preme Court of the United States afterwards decides t
no such conflict exists and that the statute is valid,
state court will overrule its former decision, at least wh
no property rights have grown up under it.[85]

But the rule is reversed where the objection to a s
ute or ordinance is based on its alleged violation of pr
sions of the constitution of the state, or where the quest
is as to its proper interpretation or application. As
these matters, the final decision lies with the highest co
of the state. And when a question of this kind comes bef
the Supreme Court of the United States, it holds it
bound to accept and follow the adjudications of the co
of last resort in the state, if any there be.[86] Therefor
the supreme federal court, in the course of deciding a c
before it, expresses an opinion upon the validity of a st
statute under the state constitution, or determines
rights of parties upon its own construction of the statu
the decision, to that extent, is not binding on the st
courts. They may and should, indeed, consider it with
spect and as an authority of high persuasive value.
they are not imperatively bound to accept or follow it,
opposition to their own judgment, and still less to overr
any previous decisions of their own.[87] Thus, where
supreme court of the state has heard and decided objecti
to a statute on the ground of its being in contravention
the state constitution, its opinion will not be reversed
a rehearing of the case, merely because the United Sta
courts had subsequently decided a like case in a contr

[85] McCollum v. McConaughy, 141 Iowa, 172, 119 N. W. 539.

[86] See infra, Chapter XIV.

[87] Crocker v. Scott, 149 Cal. 575, 87 Pac. 102; People v. Li
Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86; Penn v. Bornman.
Ill. 523; McClure v. Owen, 26 Iowa, 243; Perry v. Wheeler,
Bush (Ky.) 541; Levy v. Mentz, 23 La. Ann. 261; Deans v.
Lendon, 30 Miss. 343; Mayor, etc., of City of Baltimore v. Baltin
& O. R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; McIntyre v. In
ham, 35 Miss. 25; State ex rel. Hudson v. Trammel, 106 Mo.
17 S. W. 502; Franklin v. Kelley, 2 Neb. 79; People ex rel. Cen
Park, N. & E. R. R. Co. v. Willcox, 194 N. Y. 383, 87 N. E.
Wilkins v. Philips, 3 Ohio, 49, 17 Am. Dec. 579.

ner.[88] And so, if decisions upon the construction or rpretation of a state statute have been rendered by the e courts, and afterwards the Supreme Court of the ted States, in attempting to follow and apply those de- ns in a case before it, misinterprets them and applies n wrongly (in the judgment of the state court), its con- ions are not to be followed by the courts of the state, rather their own earlier decisions.[89] If, however, the tion of the construction of a state statute comes first re the federal court, it is eminently proper for the e court to adopt and follow its decision, unless decidedly rary to its own judgment; and this is sometimes e.[90] So also, where a state statute is enacted in terms tantially identical with those of an act of Congress ing to a similar matter, or if the state law is evidently eled upon the federal statute, decisions of the United es Supreme Court construing the act of Congress fur- a guide for the decisions of the state courts upon the e statute, which may with great propriety be followed.[91] of course they are not controlling. Thus, while a state t is bound by the decisions of the United States Su- ne Court in regard to the powers of national banks, the application of such decisions to the case of a state k, in an action before the state courts, is to be deter- ed by the state decisions.[92] Conversely, where the fed-

City of Indianapolis v. Navin, 151 Ind. 139, 51 N. E. 80, 41 L. 337.

Goodnow v. Wells, 67 Iowa, 654, 25 N. W. 864.

See State, to Use of Rogers, v. Krebs, 6 Har. & J. (Md.) 31.

In re Murff, 50 La. Ann. 998, 23 South. 965. In the case ken v. Lake Shore & M. S. Ry. Co., 248 Ill. 377, 94 N. E. 175, s said that, although the state courts are bound by the con- tion placed upon a federal statute by the federal courts, yet tate courts are not required to apply to a state statute the con- tion placed by the federal courts on a similar federal stat- but where the two statutes are nearly identical and the state te was passed after the federal statute had been construed, both statutes were intended to effect the same object, the court will be inclined to adopt the construction given to the al statute by the federal courts.

Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85.

eral court, in the absence of an applicable federal sta on the subject of service of process, adopts the state s ute, and determines that it is sufficient, the state co will not reach a contrary conclusion.[93] It should also noticed that while the rights of parties may depend on eral law, and so be fixed by the decisions of the fed courts, yet those rights or the remedies for their enfo ment may be affected by state statutes, such as the s ute of limitations, and on this point the state courts are bound by the federal decisions, but may determine the q tion on their own independent judgment.[94]

COMMERCIAL LAW

112. On questions arising out of the law merchant or eral commercial law, the courts of a state are bound to follow the decisions of the United St courts, but may do so on principles of comity, for the sake of securing uniformity of decision the federal courts sitting within its borders also with the courts of other states.

Legal questions which arise in the course of the admi tration of general commercial law, such as those rela to negotiable instruments, bills of lading, and the ordi transactions of trade and commerce, are seldom, if eve be classed as "federal questions," that is, questions ari under the constitution or laws of the United States. hence, the decisions of the federal courts, even the high on matters of this kind, have no imperative or control force in the courts of the states. In each state, the cou last resort is perfectly at liberty to work out its own tem of rules and doctrines for the government of comm cial affairs, without regard to the course of decision the Supreme Court of the United States or in the o

[93] Hollister v. Vermont Building Co., 141 Iowa, 160, 119 N 626.

[94] Lender v. Kidder, 23 Ill. 49. See City of El Paso v. Ft. I born Nat. Bank, 96 Tex. 496, 74 S. W. 21.

.[95] On the other hand, the federal courts are now cably committed to the doctrine that questions of ind are not questions of local law, in such sense that rt of the United States ought to conform to the de- s of the highest court of the state in which it sits; l such matters are regarded as belonging to the do- of "general jurisprudence," as to which they exercise independent judgment, subject only to the obligation lowing any applicable decisions of the Supreme Court United States, while the latter court holds that it is ound in these cases, as it is in the construction of the ory law of a state, to yield any deference to the rul- nade by the courts of the state from which the action s or in which it originated.[96] From this results the frequent spectacle of utterly different rules of law be- plied to the solution of the same question (perhaps a r arising out of the most ordinary and every-day ntile transactions), according to whether the suit ding in a state court or in a federal court which sits the same state and it may be in the same city.

view of this unseemly conflict, the courts of some of nief commercial states have argued strongly in favor general practice of conforming to the decisions of ederal supreme court in matters of this kind. The n of commercial law, in so far as it has been worked the courts of the United States under the lead of the me Court, has at least the merit of consistency and ng free from local variations. It would be highly de-

e Towle v. Forney, 14 N. Y. 423; Lebanon Bank v. Mangan, 452; Shelton v. Hamilton, 23 Miss. 498, 57 Am. Dec. 149; . Bonsall, 136 App. Div. 397, 120 N. Y. Supp. 983; Illinois R. Co. v. Bentz, 108 Tenn. 670, 69 S. W. 317, 58 L. R. A. Am. St. Rep. 763; Mynard v. Syracuse, B. & N. Y. R. Hun (N. Y.) 399; Wright v. Adams Express Co., 43 Pa. Ct. 40.

vift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Oates v. First Nat. 100 U. S. 239, 25 L. Ed. 580; Marshall County Sup'rs v. k, 5 Wall. 772, 18 L. Ed. 556; Liverpool & G. W. Steam Co. ix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Keene ent Sav. Bank v. Reid, 123 Fed. 221, 59 C. C. A. 225. And see, lly, infra, Chapter XVI.

sirable for the trade and business of the country gene
if that system were adopted and made uniform thro
out the land. Some endeavors have been made to re
this ideal condition by means of legislative action, as
instance, in regard to the adoption of a uniform negot
instruments law. But the courts have also their du
this respect. Perhaps no state court should be aske
reverse a long and consistent line of decisions of its
on a question of mercantile law, in deference to a con
ruling of the supreme federal court. But at least i
gard to new and unsettled questions, the propriety of
a course, on principles of comity and for the sake of
formity, is unquestionable. More than fifty years ag
Supreme Court of Ohio strongly urged that the final
tlement of all questions of general commercial law sh
be left to the Supreme Court of the United States
state courts even going to the length of overruling
own previous decisions for the sake of uniformity.
question was upon the admissibility of a party to a
gotiable instrument as a witness to impeach its validit
showing the illegality of its consideration. After sho
that the original English rule on this point had been
regarded by some of the state courts, and shaken by
more recent English decisions, but that it had been
hered to and reaffirmed by the Supreme Court of the U
States, the Ohio court remarked: "It is a rule of com
cial law, is incorporated into the system, and affects
all parts of the Union. Had the course of decision in
court been heretofore uniformly in conformity to the
recent English decisions, we should not hesitate to ch
our course upon the authority of the Supreme Court o
United States. The necessity of uniformity in matte
this nature would be a sufficient justification. It w
certainly present a case very much to the discredit o
law were a citizen of a sister state to sue one party
bill and recover in the circuit court [of the United St
because the learned judge who presides there ruled ou
evidence of an indorser, and a citizen of Ohio, suing
the same bill in this court, should fail because the

of the indorser was let in. Yet badly as this sup- case might appear, it would frequently occur in sub- e. Should this rule of evidence be changed, the doc- established by the United States court should be ıg throughout the Union upon such a question. The courts ought to follow it, because it is founded in rea- ınd for the sake of uniformity." [97] Such also is the ne of the court in Tennessee, where it has been de- that state courts should conform to the decisions of upreme Court of the United States, made upon ques- of general applicability to the states of the Union.[98] so in New York it was long ago declared by a court , though not the highest court of the state, was one ıch learning and ability, that commercial law is na- in its character, and, in order to secure uniformity, amount authority ought to be attributed to the de- s of the highest national tribunal. "This determina- of the Supreme Court of the United States] includ- e reasons by which it is sustained, commands our en- ssent, and had it been otherwise, we should still have d to its authority. The decisions of our highest na- tribunal, upon questions of general commercial law, nnot but think, ought to be regarded throughout the as authoritative and controlling. Commercial law local or sectional, but national in its character, and iformity therefore a national concern, and it is only by uting a paramount authority to the decisions of the st court of national jurisdiction that this desirable mity can be attained or preserved." [99] It must be ted, however, that these views have been very vig- y combated in certain other decisions of state .[100] And at any rate, it is proper to restrict the rule

eon v. Brown, 14 Ohio, 482.

ll v. Perkins, Peck (Tenn.) 261, 14 Am. Dec. 745. And see v. Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. p. 900; Sims v. American Nat. Bank of Ft. Smith (Ark.) W. 356.

oddard v. Long Island R. Co., 5 Sandf. 180.

ee, for instance, Forepaugh v. Delaware, L. & W. R. Co., . 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672.

to questions of law, growing out of commercial tra
tions, as distinguished from the questions of fact w
may arise in a given case. Thus, the question wheth
check has been accepted by a bank so as to enable the p
to sue on it, is rather a question of the weight of evid
than of commercial law, so that a state court need
follow a decision of the United States court for the sa
uniformity in commercial law.[101]

DECISIONS OF INFERIOR FEDERAL COUR

**113. The decisions of the inferior courts of the federal
tem, though entitled to respectful consideratio
the state courts, are not of controlling autho
except in cases where their judgments operat
way of estoppel.**

The judgment or decree of a circuit or district cou
the United States, or a circuit court of appeals, is bin
and conclusive upon the parties and those in privity
them, in any subsequent litigation in a state court
the same cause of action or involving the same dispute
sues.[102] To this extent it is of binding authority in
state courts, although the rule of law on which the j
ment or decree is based may be quite contrary to that
in similar cases by the courts of the state.[103] But th
will be observed, is on the principle of res judicata, o
doctrine of the conclusiveness of judgments, and not
of stare decisis. Apart from the question of a tech
estoppel, it is entirely proper, and indeed, usual, for
state courts to pay considerable respect to the opin
of the federal courts, particularly those which sit w
their own territory and are for the most part engage
administering the same law. Thus, on a question of

[101] Pickle v. Muse, 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 8
Am. St. Rep. 900.

[102] See 2 Black, Judgm. § 938.

[103] Smith v. Cowell, 41 Colo. 178, 92 Pac. 20; Billgery v.
Trust of Indianapolis, 48 La. Ann. 890, 19 South. 920.

interpretation, the Supreme Court of Missouri once
ked: "The views we have expressed find support in
ged cases in the United States courts for this cir-
where the statute now under consideration has been
rued." [104] Moreover, it is often proper for the state
s to go as far as they consistently can in the direction
nforming their views to those of the federal courts,
ler to avoid conflicting decisions regarding the same
ct-matter. This is illustrated by a case in Missouri,
the courts of that state had declared certain bonds
void, but the United States circuit court had adjudged
n other bonds of the same issue to be valid in the
of nonresidents. Thereupon the state court refused
plication to compel a resident holder of such bonds to
r them up to be canceled, saying: "We think it be-
the province of this court to undertake to destroy, in
ands of citizens of the United States, that which the
s of the United States declare to be property. We
exhausted our jurisdiction in declining to enforce
bonds as valid obligations, and do not think we can
lly go to the extent we are now asked to go." [105]
aside from such considerations as the foregoing, and
tters of general jurisprudence or common law or the
ory law of a state, the decisions of the inferior fed-
ourts, including the circuit courts of appeals, are not
ding authority in the state courts, and are entitled to
ore weight than the opinions of any other court of a
n jurisdiction in suits between other parties.[106] In-
in some states, as in Illinois, this rule is carried so
at the authority of the rulings of the federal courts
ected even in the very same controversy subsequently
nted to the state courts. Thus, in a personal injury
the United States circuit court of appeals, on revers-

Larrabee v. Franklin Bank, 114 Mo. 592, 21 S. W. 747, 35
t. Rep. 774.
Dallas County v. Merrill, 77 Mo. 573.
Wells v. Western Union Tel. Co., 144 Iowa, 605, 123 N. W.
4 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317; Western Union
o. v. Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354.

ing a judgment for the plaintiff and remanding the case
a new trial, held that the person whose negligence cau
the injury was a fellow-servant with the plaintiff.
latter took a nonsuit in the federal court, and brough
new action in the state court for the same injury; wh
upon it was held that the decision of the federal court
not of binding authority and did not govern the disp
tion to be made of the case.[107]

Where the question involved arises upon the const
tion of an act of Congress, or is otherwise to be clas
as a "federal question," the state courts are not absolu
bound by anything short of a ruling of the United St
Supreme Court. But if that court has not spoken, and
decisions in the various inferior federal courts are harm
ous, they furnish a guide for the determination of the s
court which must not be neglected. If, on the other ha
the views of the various United States courts are in c
flict, the state court must decide the question for itself
But if an inferior state court makes a decision in acc
ance with the rulings of the lower courts of the Uni
States, and afterwards the Supreme Court of the Uni
States announces a contrary view, the latter decision
be available, on appeal of the case from the lower to
higher state court, as a conclusive authority that the fi
ing of the trial court was wrong.[109]

RULE FOR INFERIOR STATE COURTS

114. If the decisions of the highest court of a state
those of the United States Supreme Court ar
conflict, it is the duty of an inferior court of
state to follow the rulings of the federal supr
court if the question at issue is a federal questi

[107] Spring Valley Coal Co. v. Patting, 112 Ill. App. 4, affir
210 Ill. 342, 71 N. E. 371.

[108] Stuart v. Farmers' Bank of Cuba City, 137 Wis. 66, 117 N
820.

[109] Southern Pac. Co. v. Lipman, 148 Cal. 480, 83 Pac. 445.

but as to all other matters it is bound by the adjudications of its own appellate tribunal; and the latter must also be preferred to the decisions of any inferior or intermediate court of the federal system.

sometimes happens that an inferior state court, or a court of intermediate appellate jurisdiction, when call-on to decide a question of law arising under the consti-n or laws of the United States, will be confronted with cting decisions on the part of its own appellate court f the Supreme Court of the United States. If there y doubt about the position of either of the higher s, or if any ground could be discovered on which their ons could be reconciled, it would clearly be the duty lower court to accept the determinations of the court t resort in the state, leaving to that tribunal the task stinguishing the rulings of the federal court from its or bridging the gap between them. But if both the courts have spoken in explicit terms, and the con-between them is clearly irreconcilable, the duty of ial court is to follow the decisions of the federal court. f the case should be appealed, it would then be the of the supreme court of the state to conform its de- to that of the supreme federal court, if necessary uling its own previous decisions; and the respect and nce due from the inferior court to the court having late jurisdiction over it is more properly shown in as-g that the latter court will rectify its error at the opportunity, and bring its views into harmony with of the federal supreme court, the final arbiter in such rs, than in blindly following its lead in a course dem-ated to be wrong. This rule finds direct support in a on in New York,[110] and has also been sanctioned by upreme Court of Pennsylvania, in a case in which the of the trial court pursued the course here indicated, his judgment was affirmed on appeal, the supreme

[110] Grant v. Cananea Consol. Copper Co., 117 App. Div. 576, 102 N. Supp. 642.

court writing no opinion of its own, but adopting tha
the court below. This case deserves a somewhat exter
mention, because of the peculiar problem presented to
court of first instance. One side of the argument be
that court was supported by a decision of the United St
Supreme Court and by three decisions of the Supr
Court of Pennsylvania following and adopting the fed
decision. But against this it was urged that the deci
of the supreme federal court had been virtually overru
and that the authority of the Pennsylvania cases must
with it. The court said: "If we had any doubt upon
subject, we would be bound to give the commonwealth
benefit thereof, and uphold the tax in suit, leaving it to
Supreme Court of the United States to choose its own
casion of saying plainly how much authority its own
sion should continue to have. But if the court has alr
spoken, and has plainly limited or destroyed the forc
its earlier opinion, we are bound by this action also in
sphere of federal law, and cannot refuse to follow,
if some of our own decisions are still formally in the
That this is in fact the present situation, and that the
in 15 Wallace [111] has been in effect overruled, carrying
it, of course, the cases in which our own court simply
lowed that decision, we are entirely satisfied." [112] Bu
must be admitted that contrary views as to the duty o
inferior state court, in these circumstances, prevail in s
other states.[113]

But where the question involved is not one of fed
law, but arises upon the construction of a state statut
upon the application of the common law or the principl
general jurisprudence, the decisions of the federal supr
court, as we have already seen, are not of controlling
thority upon the highest court of the state, though ent
to respectful consideration. For even stronger reas

[111] Case of Railway Gross Receipts, 15 Wall. 284, 21 L. Ed.
[112] Delaware & Hudson Canal Co. v. Commonwealth, 17 Atl.
1 L. R. A. 232.
[113] Poole v. Kermit, 37 N. Y. Super. Ct. 114; Rogers Park
ter Co. v. City of Chicago, 131 Ill. App. 35.

are not binding on the inferior state courts, while those
e state appellate court are. It follows, therefore, that
case of this kind, the trial court is under the obliga-
of following the rulings of the court of last resort in
tate, even though they should be squarely opposed to
ions of the United States Supreme Court made in sim-
ases.[114]

also, whether the matter in dispute be a federal ques-
or a question of general law, it is the duty of an in-
r state court to follow the supreme court of the state,
r than the opposing decision of a federal circuit court
rcuit court of appeals.[115] For in so doing it follows a
and certain authority which it is bound in duty to
ct, while a judgment of an inferior federal court (aside
any considerations as to its rank, its ability, or the
acter of its opinion) does not possess the force of a
ng precedent until it shall be seen whether it may be
ed or reversed by the court of last resort in the federal
m.

RULE FOR TERRITORIAL COURTS

The courts of a territory will follow the decisions of the Supreme Court of the United States, and of the United States circuit court of appeals having appellate jurisdiction, on all questions of law, except such as may arise upon the construction of a statute adopted from the legislation of one of the states, and as to the latter they will follow the decisions of the court of last resort of that state.

Dunham v. Hastings Pavement Co., 118 App. Div. 127, 103 Supp. 480, affirmed 189 N. Y. 500, 81 N. E. 1163; Devitt v. lence Washington Ins. Co., 61 App. Div. 390, 70 N. Y. Supp. ffirmed 173 N. Y. 17, 65 N. E. 777; Sadler v. Boston & Bolivia r Co., 140 App. Div. 367, 125 N. Y. Supp. 405.

Ascherson v. Bethlehem Iron Co., 2 Pa. Dist. R. 597; In re orough-Metropolitan Co., 56 Misc. Rep. 128, 106 N. Y. Supp.

Applicable decisions of the Supreme Court of the Unit
States are imperatively binding on the courts of a territor
not only when rendered in cases arising under the constit
tion or laws of the United States, but also when they ha
to do with questions growing out of the common law, t
law merchant, or the general principles of jurisprudence.
Even after the admission of a territory as a state of t
Union, its supreme court will feel constrained to follow a
apply the decisions of the supreme federal court in all a
tions which were pending in the territorial courts at t
time of such admission.[117] And a ruling of the Unit
States Supreme Court construing a statute which is,
effect, the same as a statute of one of the newly admitt
states, and rendered while the latter was a territory, w
be binding on the supreme court of the new state.[118]
has been held, however, and apparently without contrad
tion, that, as a territorial legislature has power to prescri
rules of pleading and practice, the territorial courts are n
obliged to follow a decision of the supreme federal cou
on a mere question of practice.[119] In certain cases, als
the United States circuit courts of appeals are vested
statute with appellate jurisdiction over the supreme cou
of the territories;[120] and in these cases the territorial cou
is bound to follow the decisions of the circuit court of a
peals, and must apply the law as laid down by that cou

[116] Mollhoff v. Chicago, R. I. & P. R. Co., 15 Okl. 540, 82 P
733; Hughes v. Cadena De Cobre Min. Co. (Ariz.) 108 Pac. 2
Herrera v. Chaves, 2 N. M. 86; Missouri, K. & T. Ry. Co. v. W
101 Tex. 459, 109 S. W. 112; Kroeger v. Twin Buttes R. Co. (Ar
114 Pac. 553.

[117] State Mut. Ins. Co. v. Craig, 27 Okl. 90, 111 Pac. 3
Sullivan v. Mercantile Town Mut. Ins. Co., 20 Okl. 460, 94 Pac. 6
129 Am. St. Rep. 761; Missouri, K. & T. Ry. Co. v. Walker, 27 O
849, 113 Pac. 907; Stanford v. National Drill & Mfg. Co. (O
114 Pac. 734.

[118] Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 20 L. R. A. 4
40 Am. St. Rep. 425.

[119] People v. Ritchie, 12 Utah, 180, 42 Pac. 209; Bryan v. Pinn
3 Ariz. 34, 21 Pac. 332.

[120] Act Cong. March 3, 1891, c. 517, § 15, 26 Stat. 830 (U. S. Co
St. 1901, p. 554).

even though, in the particular case, the nature of the question involved or the state of the record may prevent the taking of an appeal.[121]

The question is somewhat different when decisions upon the construction of statutes are concerned. In several instances Congress has adopted the written laws of a given state as the law for a given territory, or declared that the laws of the state shall be in force in the territory. Now it is a well-known rule of statutory construction that when the legislature of a state adopts a statute from the legislation of another state, it is presumed to do so with knowledge of any settled judicial interpretation which the statute may have received in the state of its origin, and therefore the decisions of the highest court of the latter state are to be regarded as authoritative expositions of the meaning of the statute and as binding precedents. This rule applies to the courts of a territory in cases of statutory construction. The sources of their information as to the meaning of any obscure or ambiguous passage, and the precedents for their guidance, are found in the decisions of the court of last resort of the state from which the statute was taken.[122] But this does not require them to pay any special regard to the rulings made in that state, other than such as concern the interpretation of the written law. On questions growing out of the common law or the general principles of law, the territorial courts are to follow the judgments of the federal courts, particularly the Supreme Court, though they may be contrary to the doctrines held in the state from which the written law was taken.[123]

[121] Dent v. United States, 8 Ariz. 413, 76 Pac. 455.

[122] See infra, Chapter X, p. 396.

[123] Chandler v. St. Louis & S. F. R. Co., 127 Mo. App. 34, 106 S. W. 553; Missouri, K. & T. Ry. Co. of Texas v. Rogers (Tex. Civ. App.) 128 S. W. 711.

CHAPTER X

DECISIONS OF COURTS OF OTHER STATES

116-117. Construction and Application of Laws of Another S
118. Constitutionality of Laws of Another State.
119. Construction of Statute Adopted from Another State.
120. Questions Governed by Local Laws of Another State.
121. Obiter Dictum.
122. Questions of General Law; Persuasive Authority of cisions from Another State.
123. Decisions of Inferior Courts.
124. Conforming Decisions to General Current of Authorit
125. Conflicting Decisions of Other States.

CONSTRUCTION AND APPLICATION OF LAV OF ANOTHER STATE

116. The construction put upon a state statute by the c of last resort of that state will be accepted as rect, and followed as a binding precedent, by courts of another state, when called upon to in pret and apply the statute.

117. But as this rule rests upon comity, the court tr the case will determine for itself, not necessa following the decisions in the foreign state, wh er the statute is penal or criminal, and there not enforceable in the state where the actio brought, or whether it is contrary to the laws policy of that state, or injurious to its own zens.

Interpretation of Foreign Statutes in General

The courts of each state are the proper tribunals to strue and interpret its laws, and their decisions are highest evidence of the scope and meaning of those la Hence where a statute of another state comes into a as the basis of the cause of action, or the foundation right, liability, or defense, or as the rule in accordance which the case must be decided, its meaning and appl tion are to be sought in the judicial decisions of the hig

rt of the state where it was enacted, and these decisions to be followed as conclusive and binding authorities.[1] re are indeed a few cases in the books which maintain the judicial decisions of a foreign state, in a case of kind, may be consulted as guides to the proper inter- ation of the statute, or as a source of light on the sub- but that they are not to be considered as implicitly ling precedents.[2] But these cases stand opposed to the great preponderance of authority, as will appear from mparison of the citations in the notes.

enver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; Fish nith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; Fowler mson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Van e v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. ep. 196; Klages v. Kohl, 127 Ill. App. 70; Hayward v. Sencen- h, 141 Ill. App. 395; Reid, Murdock & Co. v. Northern er Co., 146 Ill. App. 371; Brown v. Phillipps, 16 Iowa, 210; Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 82 Am. St. Rep. 529; Hendryx v. Evans & Moore, 120 Iowa, 94 N. W. 853; Hamilton v. Hannibal & St. J. R. Co., 39 Kan. Pac. 57; Crooker v. Pearson, 41 Kan. 410, 21 Pac. 270; Cucullu uisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; dway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; Mc- e v. Ingraham, 35 Miss. 25; McMerty v. Morrison, 62 Mo. 140; v. Lawrence, 23 N. J. Law, 590, 57 Am. Dec. 420; Lane & . Watson, 51 N. J. Law, 186, 17 Atl. 117; Watson v. Lane, . J. Law, 550, 20 Atl. 894, 10 L. R. A. 784; Rosenbaum v. d States Credit System Co., 64 N. J. Law, 34, 44 Atl. 966; icek v. Haddad, 67 N. J. Law, 522, 51 Atl. 938; Zeikus v. da E. C. Ry. Co., 144 App. Div. 91, 128 N. Y. Supp. 933; Jessup rnegie, 80 N. Y. 441, 36 Am. Rep. 643; Savings Ass'n of St. v. O'Brien, 51 Hun, 45, 3 N. Y. Supp. 764; Howe v. Welch, b. N. C. (N. Y.) 397; Hoyt v. Thompson, 3 Sandf. (N. Y.) 416; v. Wells, 9 Abb. N. C. (N. Y.) 277; Leonard v. Columbia n Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Watson v. Orr, C. 161; Merrimac Min. Co. v. Levy, 54 Pa. 227, 93 Am. Dec. Sparrow v. Kohn, 109 Pa. 359, 2 Atl. 498, 58 Am. Rep. 726; altz v. York Mfg. Co., 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 93 Am. St. Rep. 782; Carlton v. Felder, 6 Rich. Eq. (S. C.) ohnston v. Southwestern R. R. Bank, 3 Strob. Eq. (S. C.) 263; e v. Curtis, 59 Vt. 120, 7 Atl. 708, 59 Am. Rep. 702; Eau e Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Humphrey- Copper Co. v. Sterling, Fed. Cas. No. 6,872.

elson v. Goree's Adm'r, 34 Ala. 566; New York Life Ins. Co. glish, 95 Tex. 391, 67 S. W. 884.

To instance only a few of the numerous application this rule, we may mention cases where the rights of parties to an action depend on the construction of a for statute regulating the rights of creditors of a corpora and the personal liability of its stockholders,[3] or on statute of limitations of another state,[4] or its laws rela to assignments for the benefit of creditors.[5]

In pleading the construction of a statute of another s by the courts thereof, it is sufficient to allege in substa what the courts have decided on the point in question, it is not necessary to set out the facts on which their cisions were based nor to refer to the cases by title or port.[6] And although, properly speaking, the construc given to a foreign statute by the judicial decisions of state where it was enacted is a question of fact, to be p ed by evidence and submitted to the jury,[7] yet there rulings to the effect that evidence consisting of the cita of authorities from the foreign state is properly addres to the court, and that if the statute is pleaded and pro the court trying the case will follow the construction upon it by the highest court of the state from whenc comes, even in the absence of proof that such a const tion has been announced by that court.[8]

The rule above stated is, however, subject to import restrictions, which should be carefully noted. For ample, while the decisions of the courts of another st construing a statute of that state, will be followed as to meaning of the substantive provisions of the statute,

[3] Converse v. Ayer, 197 Mass. 443, 84 N. E. 98; Ball v. Ande 196 Pa. 86, 46 Atl. 366, 79 Am. St. Rep. 693; Eau Claire Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Jessup v. Carn 80 N. Y. 441, 36 Am. Rep. 643.

[4] Howe v. Welch, 17 Abb. N. C. (N. Y.) 397.

[5] Whitman v. Mast, Buford & Burwell Co., 11 Wash. 318, 39 649, 48 Am. St. Rep. 874.

[6] Angell v. Van Schaick, 132 N. Y. 187, 30 N. E. 395.

[7] Dyer v. Smith, 12 Conn. 384; Kline v. Baker, 99 Mass. 253.

[8] Georgia, F. & A. Ry. Co. v. Sasser, 4 Ga. App. 276, 61 S. E. Geoghegan v. Atlas S. S. Co. (Com. Pl.) 10 N. Y. Supp. 121; K v. Baker, 99 Mass. 253.

node of procedure and practice in giving the remedies ded by the statute depends on the law of the place e the remedy is sought.[9] And again, while the court g the case will follow the decisions of the highest court e foreign state as to the law of that state, it is at lib- to differ from the judgment of the foreign court as to pplication of the law to the facts.[10]

nce of Decisions

it does not appear that the particular statute has ever judicially construed in the state of its origin, or (ac- ng to some of the cases) if no proof is offered of the pretation placed upon it by the courts of that state, it is the privilege and duty of the court where the is on trial to construe the statute in the same manner would a similar statute of its own state.[11] But in case, persuasive authority may well be sought wherev- can be found; and if the statute is one which many s have adopted in substantially similar terms (like the te of limitations), it is entirely permissible for the , in the absence of direct adjudications either at home the state where the cause of action arose, to consult ecisions of a third state and be guided by their in- etation of the word or phrase in question.[12]

cting Decisions

here a foreign statute furnishes the rule according to n a case must be decided, the interpretation placed it in the state of its origin must be followed, although y be directly contrary to the domestic construction of actly similar domestic statute.[13] But this is subject e exception that an inferior court must follow the lead own supreme court, rather than the decision of the

rk v. Knowles, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep.

ee v. Missouri Pac. Ry. Co., 195 Mo. 400, 92 S. W. 614.
nith v. Bartram, 11 Ohio St. 690; Bond v. Appleton, 8 Mass. Am. Dec. 111.
nderson v. May, 10 Heisk. (Tenn.) 84.
owe v. Welch, 17 Abb. N. C. (N. Y.) 397. But compare Coats cago, R. I. & P. Ry. Co., 134 Ill. App. 217.

highest court of the foreign state, if they have reached
posite conclusions as to the meaning of the foreign
ute.[14] It is of course of very little importance that the
struction of a statute as settled by the courts of the
of its origin is out of harmony with the general cur
of judicial authority in other states having similar l
This furnishes no excuse for refusing to adopt and fo
that construction in cases where the action is founde
the foreign statute or must be governed by it.[15] Bu
some states it is considered that where the decision of
highest court of the state from whence the statute co
conflicts with decisions of the Supreme Court of the U
States relative to the subject-matter of the statute,
latter, and not the former, should be followed, espec
where they are in accordance with the settled princi
of jurisprudence in the state of the forum.[16] If the var
decisions rendered in the foreign state, concerning the
terpretation of the statute, are not clear or uniform,
the duty of the court trying the case to compare and
strue them and deduce from them the rules of law w
they establish.[17]

Basis of the Rule; Comity; "Full Faith and Credit"

The rule which requires the courts of a state to fo
the decisions of the courts of another state, when ca
upon to construe and apply a statute of the latter stat
generally said to rest on comity alone. This term, as
used, probably means little more than a polite acquiesc
in the presumption that the courts of any given state
more familiar with the meaning and purport of its stat
than the courts of any other jurisdiction could be. It w
be better to base the rule on the solid ground that jud

[14] Williams v. Chicago, R. I. & P. Ry. Co., 106 Mo. App. 6
S. W. 1167.

[15] Supreme Council of American Legion of Honor v. Green, 71
263, 17 Atl. 1048, 17 Am. St. Rep. 527.

[16] Davis v. Robertson, 11 La. Ann. 752; Cotton v. Brien, 6
(La.) 115.

[17] Ott v. Lake Shore & M. S. Ry. Co., 18 Ohio Cir. Ct. R. 39
O. C. D. 85.

sions interpreting a statute are official evidence of what aw means, and that when those decisions emanate from judicial department of the same government which ted the statute, they are the best and conclusive evie of its meaning. "Legis interpretatio legis vim ob-" is the maxim applicable in such cases. But at any this duty of following the decisions of the state where tatute was enacted cannot be deduced from that clause ie federal constitution which requires that "full faith credit shall be given in each state to the * * * ial proceedings of every other state." This provision, s been said, "does not require that judgments in one shall be followed by the courts of other states as matf authority in other similar cases. The constitution not deal with the question of the effect of such judgs as precedents, nor with the opinions of the courts ering them. It does not require the courts of one state llow those of another upon any question, whether upon onstruction of local statutes or otherwise. There may, true, be cases in which a state law or decision has ed into and become a part of a contract in such a as that a change of the law or a reversal of the deciwould impair its obligation, but in those cases the al question would arise under a different provision of onstitution. The duty of the courts of one state to v those of another, upon questions arising upon the ruction of statutes of the latter, is a duty resting alone comity, and not one imposed by the federal constitu-' 18

ption as to Penal Statutes and Public Policy

hen a court is called upon to enforce rights, causes of n, or defenses which are founded upon a statute of

Viggins Ferry Co. v. Chicago & A. R. Co. (C. C.) 11 Fed. 381. ee Lloyd v. Matthews, 155 U. S. 222, 15 Sup. Ct. 70, 39 L. S; Glenn v. Garth, 147 U. S. 360, 13 Sup. Ct. 350, 37 L. Ed. Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 Sup. , 27 L. Ed. 636; Winona & St. P. R. Co. v. Town of Plainview, S. 371, 12 Sup. Ct. 530, 36 L. Ed. 191; Washington Life Ins. Glover, 78 S. W. 146, 25 Ky. Law Rep. 1327.

another state, it must consider whether the law in qu
is penal or criminal in its nature, whether it is contra
the public policy or interests of the state of the foru
whether it operates disadvantageously upon the citize
that state; for in either of these cases, according t
well-settled principles of private international law, c
does not require the enforcement of the statute beyon
limits of the state which enacted it. Whether or no
open to any of these objections may be a question de
ing on the construction of the statute; and if so, it
question which is fully open to the independent de
of the court trying the case, and on which it is not b
by the adjudications in the state where the law wa
acted.[19]

CONSTITUTIONALITY OF LAWS OF ANOT STATE

118. Decisions of the highest court of a state that a s of the state is valid or invalid, as tested by it formity to the constitution of the state, w followed by the courts of other states; but question concerns its validity under the con tion and laws of the United States, courts of states will preferably follow a decision of th preme Court of the United States, if there b such precedent.

Cases sometimes occur in which it is necessary, in
to a correct decision on the rights of the parties, to
upon the constitutional validity of a statute of an
state. This is a function which, for very obvious rea

[19] Whitlow v. Nashville, C. & St. L. R. Co., 114 Tenn. 344, 84
618, 68 L. R. A. 503; Southern Ry. Co. v. Decker, 5 Ga. A
62 S. E. 678; St. Louis & S. F. Ry. Co. v. Conrad (Tex. Civ. A
S. W. 209; Finney v. Guy, 106 Wis. 256, 82 N. W. 595, 49 L.
486; Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 8
Am. St. Rep. 194. And see Alleghany Co. v. Allen, 69 N. J
270, 55 Atl. 724.

are reluctant to assume and which they will avoid it is absolutely essential to the determination of the on involved.[20] But if the case cannot otherwise be ed of, the court will consult the decisions of the of last resort in the state where the statute was d, and, so far as the objection to the statute in ques- based on an alleged conflict with the constitution of ate, those decisions will be treated with the very st respect, if not followed implicitly. If an act of tion has already been adjudged unconstitutional and y the courts of the state which enacted it, it is diffi- conceive of any circumstances in which the courts ther state would sustain its validity. In the con- case, where the statute has been pronounced good alid by the home courts, and its operation affects the of a party litigant in the courts of another state, tter courts are indeed at liberty to exercise their udgment. The authorities on this point, which are merous, do not go to the length of holding that the of a foreign state are imperatively bound to follow ecisions rendered in the state whence the statute . But both the principle of comity and a due regard e force of official precedents bind them to pay the highest respect to those decisions, so that nothing excuse a dissent from them and a contrary holding, it were an exceptionally plain case of obvious con- onal invalidity and of palpable mistake on the part of urt which had sustained the statute.[21] If, however, estion arises from an alleged repugnance of the stat- the federal constitution or an act of Congress, the trying the case will be bound by a decision of the ne Court of the United States, if any there be, on the point, or otherwise it will be at liberty to exercise n judgment.[22]

elden v. Miller, 9 La. Ann. 187.

e Kean v. Rice, 12 Serg. & R. (Pa.) 203; Stoddart v. Smith, Pa.) 355; McDowell v. Lindsay, 213 Pa. 591, 63 Atl. 130.

Dowell v. Lindsay, 213 Pa. 591, 63 Atl. 130; Stoddart v. 5 Bin. (Pa.) 355.

CONSTRUCTION OF STATUTE ADOPTED F ANOTHER STATE

119. Where a statutory law of one state, which had received a settled judicial construction, is ad wholly or in part, and enacted as a law of the adopting it, it is presumed that the constru previously put upon it is adopted with it, an decisions of the highest court of the original in which such construction was announced, ous to its enactment in the other state, are im tively binding, as precedents, on the courts latter state.

The General Rule

The judicial interpretation of a statute, when auth tive and settled, enters into the statute and becor part of it. Hence if the legislature of a state, in legis upon a given subject, literally or substantially copie language of a statute previously existing in another or borrows from such statute a provision, clause, or p the same having received a settled judicial interpre in the state of its origin, it is a presumption of law th enactment was made with knowledge on the part legislature that such interpretation existed and what i And further it is presumed that it was the design legislature that the act should be understood and a according to that interpretation. Therefore the judici cisions rendered in the state where the statute origi previous to the time of its enactment in the other stat announcing is construction and interpretation, are received in the courts of the adopting state, not as suasive evidence of the meaning of the statute, but solutely binding and authoritative precedents, which not be departed from, unless it be for reasons suffic strong to induce a court of last resort to overrule its own previous decisions.[28]

[28] *United States.*—Metropolitan R. Co. v. Moore, 121 U. 7 Sup. Ct. 1334, 30 L. Ed. 1022; Stutsman County v. Walla

ence of Adoption of Statute

ıe fact that a legislative enactment is almost a literal of a statute already in force in another state, em- ing the same substantial provisions, and also similar in respect to the arrangement in sections or clauses, ery strong presumptive evidence that the legislature

293, 12 Sup. Ct. 227, 35 L. Ed. 1018; Coulter v. Stafford (C. 3 Fed. 266; Jennings v. Alaska Treadwell Gold Min. Co., 170 146, 95 C. C. A. 388; Harrill v. Davis, 168 Fed. 187, 94 C. C. A. L. R. A. (N. S.) 1153; Welsh v. Barber Asphalt Pav. Co., 167 465, 93 C. C. A. 101; Boise City, etc., Water Co. v. Boise City, , 123 Fed. 232, 59 C. C. A. 236; Blaylock v. Incorporated Town uskogee, 117 Fed. 125, 54 C. C. A. 639; Swofford Bros. Dry- Co. v. Mills (C. C.) 86 Fed. 556. *Arizona.*—Goldman v. So- 8 Ariz. 85, 68 Pac. 558; Santa Cruz County v. Barnes, 9 Ariz. Pac. 621; Anderson v. Territory, 9 Ariz. 50, 76 Pac. 636; Cos- v. Muheim, 9 Ariz. 422, 84 Pac. 906. *Arkansas.*—McNutt v. tt, 78 Ark. 346, 95 S. W. 778. *Colorado.*—In re Shapter's Es- 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. 217; McGovney v. Gwillim, 15 Colo. App. 284, 65 Pac. 346; n v. Matthews, 20 Colo. App. 170, 77 Pac. 366; United States ty & Guaranty Co. v. People, 44 Colo. 557, 98 Pac. 828; At- , T. & S. F. R. Co. v. Farrow, 6 Colo. 498. *Florida.*—Duval v. 34 Fla. 85, 15 South. 876; Atlantic Coast Line R. Co. v. Beaz- 4 Fla. 311, 45 South. 761. *Idaho.*—Stein v. Morrison, 9 Idaho, 5 Pac. 246. *Illinois.*—Freese v. Tripp, 70 Ill. 496; Rigg v. Wil- 3 Ill. 15, 54 Am. Dec. 419; Fisher v. Deering, 60 Ill. 114; Camp- Quinlin, 4 Ill. 288; Requa v. Graham, 86 Ill. App. 566; Wan- er v. Poorbough, 91 Ill. App. 560. *Indian Territory.*—J. B. Bos- . v. Eggleston, 7 Ind. T. 134, 104 S. W. 566; McFadden v. er, 2 Ind. T. 260, 48 S. W. 1043, 58 L. R. A. 878; Robinson v. 2 Ind. T. 360, 51 S. W. 975. *Indiana.*—City of Laporte v. Game- Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686, . St. Rep. 359; Clark v. Jeffersonville, M. & I. R. Co., 44 Ind. Fall v. Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278. *Kansas.*— on, T. & S. F. R. Co. v. Franklin, 23 Kan. 74; Stebbins v. ie, 4 Kan. 364; Nelson v. Stull, 65 Kan. 585, 68 Pac. 617; v. Becker, 1 Kan. 226. *Michigan.*—Drennan v. People, 10 169; Harrison v. Sager, 27 Mich. 476; Greiner v. Klein, 28 12; Daniels v. Clegg, 28 Mich. 32; State v. Holmes, 115 Mich. 3 N. W. 548; Stellwagen v. Wayne Probate Judge, 130 Mich. 9 N. W. 728; Besser v. Alpena Circuit Judge, 155 Mich. 631, . W. 902; Shaw v. Hoffman, 25 Mich. 162. *Minnesota.*—Nicol- t. Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. 643; *Missouri.*—State ex rel. Missouri & M. R. Co. v. Macon

intended to and did adopt and re-enact that statute.[24] to bring into operation the rule of construction s above, it is not necessary that the one statute shou a close verbal copy of the other; it is enough if the stance of the statute, or some controlling word or p has been adopted and enacted.[25] But when similar sta are found not only in one other state, but in several states, or when the statute alleged to have been ad

County Court, 41 Mo. 453; Chillicothe & B. R. Co. v. Mayor of City of Brunswick, 44 Mo. 553; State ex rel. Guion v. Mile Mo. 127, 109 S. W. 595; Knight v. Rawlings, 205 Mo. 412, 104 38, 13 L. R. A. (N. S.) 212; State v. Chandler, 132 Mo. 155, 33 797, 53 Am. St. Rep. 483; Stephan v. Metzger, 95 Mo. App. 6 S. W. 625; St. Louis Nat. Bank v. Hoffman, 74 Mo. App *Montana.*—Lindley v. Davis, 6 Mont. 453, 13 Pac. 118; State Bank v. Albertson, 39 Mont. 414, 102 Pac. 692; In re Wisn Mont. 298, 92 Pac. 958; Butte & B. Consol. Min. Co. v. Mo Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825; Largey v. Cha 18 Mont. 563, 46 Pac. 808. *Nebraska.*—Forrester v. Kearney Bank, 49 Neb. 655, 68 N. W. 1059; Gentry v. Bearss, 82 Neb 118 N. W. 1077; Goble v. Simeral, 67 Neb. 276, 93 N. W. 235 *rada.*—State v. Robey, 8 Nev. 312. *New Jersey.*—Rutkowsky v za, 77 N. J. Law, 724, 73 Atl. 502. *New Mexico.*—Reymond v. comb, 10 N. M. 151, 61 Pac. 205. *North Dakota.*—State v. Bla 18 N. D. 31, 119 N. W. 360; Cass County v. Security Imp. Co. D. 528, 75 N. W. 775. *Oklahoma.*—United States v. Choctaw, G. R. Co., 3 Okl. 404, 41 Pac. 729; Hixon v. Hubbell, 4 224, 44 Pac. 222; Chisolm v. Weisse, 2 Okl. 611, 39 Pac. 467. *gon.*—Dawson v. Coffey, 12 Or. 513, 8 Pac. 838; Jamieson v. 55 Or. 292, 105 Pac. 93, 25 L. R. A. (N. S.) 24; Abraham v. C Roseburg, 55 Or. 359, 105 Pac. 401; Everding v. McGinn, 23 C 35 Pac. 178. *South Dakota.*—Murphy v. Nelson, 19 S. D. 19 N. W. 691; Yankton Sav. Bank v. Gutterson, 15 S. D. 486, 90 144; Carlson v. Stuart, 22 S. D. 560, 119 N. W. 41. *Texas.*— of Tyler v. St. Louis Southwestern Ry. Co., 99 Tex. 491, 91 S. Ollre v. State, 57 Tex. Cr. R. 520, 123 S. W. 1116. *Virginia.*—C peake & O. Ry. Co. v. Pew, 109 Va. 288, 64 S. E. 35. *Washi* —In re City of Seattle, 49 Wash. 109, 94 Pac. 1075. *Wiscon* Westcott v. Miller, 42 Wis. 454; Kilkelly v. State, 43 Wis. Draper v. Emerson, 22 Wis. 147; Pomeroy v. Pomeroy, 93 Wis 67 N. W. 430; State ex rel. Rogers v. Wheeler, 97 Wis. 96, 72 225.

[24] Mann v. Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. (150.

[25] State ex rel. Guion v. Miles, 210 Mo. 127, 109 S. W. 595.

another state appears to be founded on or copied from nglish act of parliament, the actual source of the stat- ınder construction becomes a question of fact, and verbal parallelism with any one of the similar stat- is not conclusive proof that it was copied therefrom, to make the decisions of one jurisdiction, on the in- etation of the statute, binding precedents rather than of another.[26] If this question cannot be determined inute textual criticism of the statute, it would presum- be proper to recur to the journals of the legislature heir debates, at the time of its enactment, for the pur- of determining what piece of legislation they actually n mind and used as a model.

ımption as to Legislative Intent

e presumption that the legislature of a state, in adopt- statute already in force in another state, intended to also the judicial construction there put upon it is not iable and is not to be applied contrary to ascertained or the reasonable probabilities of the case. Its force always depend on the extent to which the terms of tatute have acquired a settled meaning and a definite cation at the time of its adoption, in the courts of the liction from which it is taken.[27] The construction nded for must have been placed on the statute by the st court authorized to pass upon the question, and construction must have been so long established that reasonably be supposed that it must have been known e legislature adopting the statute.[28] It does not fol- therefore, that a single and isolated decision must be as irrevocably fixing the interpretation of the statute, an there be a conclusive presumption that the legis- e of the state which adopted the statute knew of that on, approved it, and intended that its own courts

'exas & P. Ry. Co. v. Humble, 181 U. S. 57, 21 Sup. Ct. 526, Ed. 747; Burnside v. Wand, 170 Mo. 531, 71 S. W. 337, 62 L. 427; State ex rel. Attorney General v. Portage City Water 07 Wis. 441, 83 N. W. 697.

'ratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656. mith v. Baker, 5 Okl. 326, 49 Pac. 61.

should follow it as a precedent; more especially is this case where the decision in question appears to be cont to the obvious meaning of the statute.[29]

What Decisions Authoritative as Precedents

In ascertaining the settled judicial construction statute which has been adopted from another state course must be had to the decisions of the highest cour that state. As to rulings of the inferior courts, they fu very slight evidence of the domestic construction of statute, and they are not to be considered at all when conflict with the decisions of the court of last resort.[30] can importance be attached to a practical construction upon the law by the executive or administrative office the state from which it was taken; for the presumptio which we are speaking does not extend to anything b settled interpretation of the statute as fixed by the au itative deliverances of the courts.[31] Again, the cons tion of the statute, in order to be considered as having thus adopted with the statute itself, must have been r and settled before the adoption; and decisions rend in the state from which the law was taken, but after time, may be entitled to respectful consideration an some argumentative weight as evidence of the mea of the law, but they are in no sense imperatively bin precedents.[32] And further, this principle is properly plicable only in cases of first impression. When the preme court of a state has placed a construction up statute adopted from another state, though it be cont to the judicial interpretation of the law in the state

[29] Whitney v. Fox, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed.

[30] Osborne v. Home Life Ins. Co., 123 Cal. 610, 56 Pac. 616; S v. Baker, 5 Okl. 326, 49 Pac. 61.

[31] Gray's Lessee v. Askew, 3 Ohio, 466.

[32] Stutsman County v. Wallace, 142 U. S. 293, 12 Sup. Ct. 2 L. Ed. 1018; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 4 St. Rep. 627; Elias v. Territory, 9 Ariz. 1, 76 Pac. 605; Germ Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am Rep. 215; Barnes v. Lynch, 9 Okl. 11, 156, 59 Pac. 995; Northc Enger, 132 Mo. 265, 33 S. W. 1125; Wyoming Coal Min. Co. v. ex rel. Kennedy, 15 Wyo. 97, 87 Pac. 984, 123 Am. St. Rep. 101

ıce it was taken, the principle of stare decisis would
:r require it thereafter to adhere to its own previous
ion than to yield to the conflicting decision in the
r state.[33]

ons for Rejecting Foreign Interpretation

ıe rule stated above is not invariable, but is subject
ell-defined exceptions. It is said, indeed, that the
truction placed upon a statute by the courts of the
from which it was adopted should not be rejected ex-
for the strongest reasons,[34] and that before discard-
t, a court must find some more cogent reason than its
conviction of the unwisdom of such legislation as con-
d by the courts of the other state.[35] But courts have
esitated to take this course when the foreign decisions
to them appeared to them to be contrary to the plain
ing of the statute, unsatisfactory in their reasoning,
posed to the decided weight of authority in various
states having substantially similar statutes.[36] So
where the statute, as construed in the state of its ori-
would be inapplicable to conditions existing in the state
adoption,[37] or where the statute as adopted is not
ral copy of the statute as originally enacted, but em-
s a change of phraseology which necessitates a change
terpretation.[38] And of course the rule cannot prevail

lorgan v. State, 51 Neb. 672, 71 N. W. 788.
tadler v. First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am.
p. 582.
reston Nat. Bank v. Wayne Circuit Judge, 142 Mich. 272, 105
757.
thea v. State, 63 Neb. 461, 88 N. W. 789; Spokane Mfg. &
r Co. v. McChesney, 1 Wash. 609, 21 Pac. 198; Ancient Order
bernians, Division No. 1, of Anaconda, v. Sparrow, 29 Mont.
4 Pac. 197, 64 L. R. A. 128, 101 Am. St. Rep. 563.
irman v. Powning, 25 Nev. 378, 61 Pac. 1090; Copper Queen
l. Min. Co. v. Territorial Board of Equalization, 206 U. S. 474,
p. Ct. 695, 51 L. Ed. 1143.
opper Queen Consol. Min. Co. v. Territorial Board of Equili-
, 9 Ariz. 383, 84 Pac. 511, affirmed 206 U. S. 474, 27 Sup. Ct.
1 L. Ed. 1143; Howells Min. Co. v. Grey, 148 Ala. 535, 42
. 448. But a mere change in the punctuation of a sentence,
is literally copied from a statute of another state, will not

against an express provision in the statute which indicates an intention of the legislature that the construction given to the statute in the state of its origin should not be adopted.[39] Finally, if the original construction of the adopted statute is not in harmony with the spirit and policy of the laws of the state adopting it, or would make it conflict with existing laws of that state or with the settled practice under them, it will not be followed, but the courts will work out a construction for themselves.[40]

Limitations of Rule

The rule under consideration is limited to questions which strictly arise out of or depend on the construction of the statute. As to matters which are collateral or incidental, and which are not determined by the interpretation of the statute, though they could not arise but for the existence of the statute, the decisions of the state where the law originated are not controlling. For example, although a statute of one state regulating the organization of corporations may be literally copied from a statute of another state, the question of the liability of promoters before filing the articles of incorporation is one which does not depend on the statute, and which, therefore, the courts of the former state are at liberty to determine for themselves.[41] So, where the courts of the state in which the statute was first enacted have decided that it must be aided

necessarily involve putting a different interpretation upon it. Griffiths v. Montandon, 4 Idaho, 377, 39 Pac. 548.

[39] Missouri Pac. Ry. Co. v. State, 69 Kan. 552, 77 Pac. 286.

[40] F. M. Davis Iron Works Co. v. White, 31 Colo. 82, 71 Pac. 384; Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 South. 761; Florida Cent. & P. R. Co. v. Mooney, 40 Fla. 17, 24 South. 148; Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 N. E. 371, 11 L. R. A. (N. S.) 623; Gage v. Smith, 79 Ill. 219; McCutcheon v. People, 69 Ill. 601; Cole v. People, 84 Ill. 216; Jamison v. Burton, 43 Iowa. 282; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; Oleson v. Wilson, 20 Mont. 554, 52 Pac. 372, 63 Am. St. Rep. 639; Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S. W. 62, 4 L. R. A. (N. S.) 1180; Dixon v. Ricketts, 26 Utah, 215, 72 Pac. 947; State v. Mortensen, 26 Utah, 312, 73 Pac. 563; Coad v. Cowhick, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953.

[41] Western Inv. Co. v. Davis, 7 Ind. T. 152, 104 S. W. 573.

by the common law, that is an interpretation which is binding on the courts of a state adopting the statute, but the particular rule of common law which must be invoked is for the determination of the latter courts on their own judgment.[42]

Statutes Common to Several States

Where a statute of one of the older states, like New York, for example, has been copied and adopted by numerous other states, the decisions of the state which originated the statute, upon its construction, are generally considered of the highest authority. But if varying or contrary constructions of the same clause or provision have been announced in the different states where the statute is in force, a court which is called upon for the first time to interpret it will not necessarily feel bound to follow the rulings made in the state where the statute originated; but on the contrary, if convinced that those rulings are not founded on sound reason and that they are opposed to the decided weight of authority in the other states, it may refuse to adopt them.[43] In cases where no conflict of authority is apparent, but where there is no direct adjudication upon the point in question in the state from which the statute was taken, a decision upon its construction by the supreme court of one of the states adopting it will have high evidential value as to its true meaning in the courts of another of the states which have adopted it, though perhaps not of quite so much force as a decision from the original state.[44]

Adopted Constitutional Provisions

A similar rule governs the construction of constitutional provisions which have been adopted from another state. That is, where a clause or provision in a constitution, which has received a settled judicial construction, is adopted in

[42] Bliss v. Caille Bros. Co., 149 Mich. 601, 113 N. W. 317.

[43] State v. Campbell, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533; Durham v. Linderman, 10 Okl. 570, 64 Pac. 15.

[44] Bowen v. Crow, 16 Neb. 556, 20 N. W. 850. And see Springfield v. Fulk (Ark.) 131 S. W. 694.

the same words by the framers of another constitution, it will be presumed that the construction thereof was likewise adopted, and the decisions in which that construction was announced will be regarded as binding precedents.[45]

State Statutes Extended over Territory

Where congress, in organizing a territory or legislating for it, adopts for it the laws of a particular state or declares that those laws shall be operative in the territory, it is understood as adopting also the judicial construction previously put upon those laws in the state of their origin; and the decisions of the highest court of that state, upon the interpretation of a given statute, made previous to the act of congress, will be followed by both the territorial courts and the United States courts sitting in the territory as binding precedents.[46] This rule is applicable to the construction of the laws of Maryland made applicable by act of congress in the District of Columbia; to those of the state of Arkansas, extended by congress over the Indian Territory, and now to a certain extent in force in Oklahoma; and to the statutes of Oregon declared to be in force in the district of Alaska.

QUESTIONS GOVERNED BY LOCAL LAW OF ANOTHER STATE

120. Generally, where a pending issue is to be governed by the law of another state, or by some law other than the lex fori, and where authoritative expositions of such foreign law can be found proceeding from the courts, they will be accepted and followed as binding precedents.

[45] Ex parte Roundtree, 51 Ala. 42; Jenkins v. Ewin, 8 Heisk. (Tenn.) 456; Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; Daily v. Swope, 47 Miss. 367; People ex rel. Attorney General v. Burbank, 12 Cal. 378.

[46] Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752; Capitol Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873; Robinson v. Belt, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65; Kohn v. McKinnon (D. C.) 90 Fed. 623;

This is in effect an extension of the rule previously discussed, that where a case is to be determined in accordance with the provisions of a statute of another state, the construction put upon the statute by the highest court of that state will be accepted as authoritative. The rule now stated carries the principle involved out of the restricted field of statutory construction and into the domain of general law. Thus, for instance, a contract is to be governed by the law of the state where it was made and is to be performed, and if it is made the subject of litigation in another state, the lex loci contractus will be sought, not only in the statute book but also in the decisions of the courts, and the latter will be regarded as binding precedents and will be followed.[47] So again, decisions construing a charter or relating generally to the organization, rights, and powers of corporations and the liability of their stockholders will be respected and followed in all other states, as a part of the local law of another jurisdiction, which they may be called upon to ascertain and apply.[48] And so gen-

Fish v. Hemple, 2 Alaska, 175; Snellen v. Kansas City Southern Ry. Co., 82 Ark. 334, 102 S. W. 193; Murphey v. Brown, 12 Ariz. 268, 100 Pac. 801; Morris v. Hitchcock, 21 App. D. C. 565; Strasburger v. Dodge, 12 App. D. C. 37; Zufall v. United States, 1 Ind. T. 638, 43 S. W. 760; Blaylock v. Town of Muskogee, 4 Ind. T. 43, 64 S. W. 609; Boyt v. Mitchell, 4 Ind. T. 47, 64 S. W. 610; Carter v. Barton, 2 Ind. T. 99, 48 S. W. 1017; McFadden v. Blocker, 3 Ind. T. 224, 54 S. W. 873, 58 L. R. A. 894; Western Inv. Co. v. Davis, 7 Ind. T. 152, 104 S. W. 573; Le Bosquet v. Myers, 7 Ind. T. 75, 103 S. W. 770; National Live Stock Commission Co. v. Taliaferro, 20 Okl. 177, 93 Pac. 983; State ex rel. Sims v. Caruthers, 1 Okl. Cr. 428, 98 Pac. 474; Red River Nat. Bank v. De Berry, 47 Tex. Civ. App. 96, 105 S. W. 908.

[47] Faulkner v. Hart, 44 N. Y. Super. Ct. 471; Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; Studebaker Bros. Co. v. Mau, 14 Wyo. 68, 82 Pac. 2; Meuer v. Chicago, M. & St. P. R. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774; Baldree v. Davenport, 7 La. Ann. 589.

[48] Clark v. Turner, 73 Ga. 1; Grant v. Henry Clay Coal Co., 80 Pa. 208; Johnston v. Southwestern Railroad Bank, 3 Strob. Eq. (S. C.) 263. But compare Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650; Campbell v. American Ben. Club Fraternity, 100 Mo. App. 249, 73 S. W. 342.

erally in regard to the construction of a will, made in the state of the domicile of the testator;[49] though as to this last point, and generally as to the construction of contracts of any kind, an exception is made at the point where they concern lands lying within the state in which the suit is pending; for as to lands within its jurisdiction, a court is not bound to adopt the interpretation put upon an instrument by the courts of any other state.[50] The same general rule applies in transitory common-law actions for injuries occurring in other states; the question of the existence of a cause of action, and also the question of the availability of given defenses, are to be determined by the law of the state where the injury occurred, of which law the decisions of its highest courts are conclusive evidence.[51]

But in many states it is now held that if the question at issue is to be decided according to the principles of the common law or according to the general commercial law, the court trying the case is not bound to follow the decisions of another state, even though the case is that of a contract made and to be performed in such other state, but must determine the law for itself and follow its own precedents.[52] But to this the Supreme Court of Pennsylvania

[49] Rackemann v. Wood, 203 Mass. 501, 89 N. E. 1037.

[50] Coveney v. Conlin, 20 App. D. C. 303; McCartney v. Osburn, 118 Ill. 403, 9 N. E. 210; Folsom v. Board of Trustees of Ohio State University, 210 Ill. 404, 71 N. E. 384; McCormick v. Bonfils, 9 Okl. 605, 60 Pac. 296.

[51] Gabriel v. St. Louis, I. M. & S. Ry. Co., 135 Mo. App. 222, 115 S. W. 3; Louisville & N. R. Co. v. Smith, 135 Ky. 462, 122 S. W. 806; Rahm v. Chicago, R. I. & P. Ry. Co., 129 Mo. App. 679, 108 S. W. 570.

[52] Akers v. Jefferson County Sav. Bank, 120 Ga. 1066, 48 S. E. 424; Krogg v. Atlanta & W. P. R. Co., 77 Ga. 202, 4 Am. St. Rep. 77; Lay v. Nashville, C. & St. L. Ry. Co., 131 Ga. 345, 62 S. E. 189; Nathan v. Lee, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820; National Bank of Michigan v. Green, 33 Iowa, 140; Anderson v. Pittsburg Coal Co., 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624; Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 S. W. 754; Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; St. Nicholas Bank of New York v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; Alexander v. Bank of Lebanon, 19 Tex. Civ. App. 620, 47 S. W. 840. And see Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446.

has expressed a very vigorous dissent in the following terms: "It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding; and, in the absence of any statute in New York expressly authorizing such a contract, the courts of this state must follow their own views of the commercial as part of the general common law, though different views may be held as to such law by the courts of New York. This is the main argument of the plaintiff, and as it is one which is frequently advanced and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial or general common law, separate from, and irrespective of, a particular state or government whose authority makes it law. * * * The point is the force of judicial decisions on the common law, and the assumption that there is any tenable basis for holding them less binding upon such law than upon statutes. The so-called commercial law derives all its force from its adoption as a part of the common law, and a decision on the commercial law of a state stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either is that it does not agree with the premises or the reasoning of the court. But the same ground would enable it to question a decision upon a statute because a different construction seemed to it nearer the true intent of the legislative language, and this, it is universally conceded, no foreign court can do. There is no difference in principle. The decisions of a state court, upon its common law and on its statutes, must stand unquestioned, because it is the only competent authority to decide; or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusions." [53]

[53] Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672.

OBITER DICTUM

121. Although a statement of law in an opinion rendered by the highest court of a state may be, strictly speaking, obiter dictum with reference to the case decided, yet it is evidence of the law of that state when the same is to be ascertained and applied in the courts of another state.

When the courts of one state are called upon to ascertain and apply the law of another state, as expounded by its judicial tribunals, with reference, for example, to the construction of a statute or any question of local law, a direct adjudication upon the very point at issue is of course the most satisfactory evidence of what that law is. But in the absence of such an adjudication, a remark made in passing by the highest court of that state, if squarely in point, is not to be rejected because mere dictum, but on the contrary, it may be accepted as evidence of the law of that state and followed as a precedent.[54]

QUESTIONS OF GENERAL LAW; PERSUASIVE AUTHORITY OF DECISIONS FROM ANOTHER STATE

122. On questions of general jurisprudence and the construction of domestic statutes, decisions made under a similar legal system prevailing in another state may be cited as persuasive authority, respected for their reasoning and judgment, and followed if approved, but they are not binding as precedents.

General Rule

The rule or principle of stare decisis is properly applicable only as between the several courts composing the same

[54] Haven v. Haven, 181 Mass. 573, 64 N. E. 410; Meuer v. Chicago, M. & St. P. Ry. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774.

judicial system, and, strictly speaking, only in instances where the same court which rendered a previous decision is called upon to abide by it or to repudiate it. The degree of force or authority to be accorded to a decision of the chief court of one state, when cited to the highest court of another state, is not measured by this doctrine. There are indeed, as already noted in these pages, exceptional cases in which the courts of one state will follow the decisions of the court of last resort in another state, without inquiry into their soundness, where the question concerns the construction of a foreign statute or of a statute adopted from the legislation of another state, or the application of the local law of a foreign jurisdiction. But aside from these special cases, and generally where the question to be decided is one of general jurisprudence or concerns the lex fori or the interpretation of domestic statutes, decisions rendered in another state are proper to be cited if in point, and may be entitled to respectful consideration if well reasoned, promotive of justice, and well supported by the general current of authority, but they are not technically of force as precedents. Such decisions may be followed, if the court hearing the case approves their reasoning and conclusions. But it is at perfect liberty to disregard them, and is not constrained in this respect by either the principle of comity, or the constitution and laws of the United States.[55]

Occasions for Citing and Consulting Decisions of Other States

Bearing in mind the limited authority of judicial decisions from other states, as above set forth, it may be said, generally, that such authorities may properly be cited and referred to, first, in support and confirmation of a principle

[55] Caldwell v. Gale, 11 Mich. 77, 84; Franklin v. Twogood, 25 Iowa, 520, 96 Am. Dec. 73; Rouse, Hazard & Co. v. Donovan, 104 Mich. 234, 62 N. W. 359, 27 L. R. A. 577, 53 Am. St. Rep. 457; Crippen v. Laighton, 69 N. H. 540, 44 Atl. 538, 46 L. R. A. 467, 76 Am. St. Rep. 192; Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650; Koontz v. Nabb, 16 Md. 549; Nelson v. Goree's Adm'r, 34 Ala. 565; Jamison v. Burton, 43 Iowa, 282; Ft. Wayne Iron & Steel Co. v. Parsell (Ind. App.) 94 N. E. 770; State v. Brown, 143 Wis. 405, 127 N. W. 956; Morris v. City of Indianapolis (Ind.) 94 N. E. 705.

of law previously announced by a decision or series of decisions of the domestic court; second, in argument to induce the court to overrule a previous decision of its own, or as justification for its so doing; and third, where the case on trial is one of first impression and not governed by any direct precedent. As to the first instance, any appellate court is naturally disposed to abide by its own previous decisions and satisfied with citing them in its subsequent decisions in similar cases. Any volume of reports, opened at almost any page, will show the familiar remark: "We are spared the necessity of referring to the decisions in other states, since the precise point has been settled by our own previous adjudications." Yet this disinclination to travel outside the restricted circle of their own jurisprudence is sometimes productive of results which cannot be described as fortunate. In certain of the older eastern states, we find the courts often more burdened than benefited by the accumulated mass of ancient and modern precedents, and frequently compelled laboriously to "distinguish" away a line of previous decisions, or else stretch them to the breaking point, in order to fit them to the controversy on trial; whereas, if it were admitted that the case was really one of first impression, and if it were then considered in the light of all pertinent decisions from other states, such a course might often result in the rendition of more satisfactory and convincing opinions, and would certainly help to bring about that uniformity of law and procedure in the different states which is so much to be desired and as yet so remote. But in the case where a decision which forms a direct precedent for the case on trial is assailed and the court is urged to overrule it, it may well be buttressed by concurring decisions of the courts of other states and derive no inconsiderable strength from their support. To cite a single instance of the applicability of foreign decisions in this connection, we may quote a remark once made by the Supreme Court of California, that "in answer to the claim that these cases should be overruled, so far as they treat upon the subject in hand, it is enough to say that they are supported by many au-

thorities elsewhere and in our opinion should be sustained." [56]

As to the converse case,—where decisions from other states are used as arguments to induce a court to overrule a previous decision of its own or break a line of such decisions,—it is but seldom that an isolated decision from another jurisdiction can be relied on to produce this effect. But the argument is much stronger where concurring lines of decisions from numerous other states can be produced, all combining to make up what is called a "general current of authority" or "general tendency of the decisions." Instances are not wanting in which the accumulative force of such a body of precedents has availed with appellate courts and caused them to abandon their own previous position on the same question. This will be more fully developed in a later section.

Same; Res Nova or Case of First Impression

Where a particular question comes before an appellate court for the first time, and is therefore not governed by any direct precedent, it is not only permissible, but it is usual and proper for the court to pay very serious attention to a decision cited from any other state, if it bears fairly upon the question at issue. Though such a decision is not a binding precedent, it is an "authority," the force of which may vary according to the character of the opinion, the degree of care and thoroughness with which it was prepared, the vigor and directness of its reasoning, the justice of its conclusions, the general reputation of the court from which it proceeds, and other pertinent considerations. And if it favorably impresses the court to which it is cited, that court may well adopt its reasoning, follow its conclusions, and rely upon its support. Many instances of this reliance upon an authority from another state might be cited, but a few will suffice as illustrations. The Supreme Court of Ohio, having to decide a novel question in the law of malicious prosecution, observed that "having no direct adjudication on the question before us, we may look to the anal-

[56] Baird v. Crank, 98 Cal. 293, 33 Pac. 68.

ogies of the law," and accordingly the case was decided on the authority of an opinion of the Supreme Court of New York in a case which, though not strictly parallel with the case at bar, presented the same general legal question.[57] In the same way, when the Supreme Court of Oregon was first confronted with the question whether a woman could be admitted to practice as an attorney at law in that state, the question was decided solely on the authority of a decision in Massachusetts, in which there was "a very able opinion delivered by the late chief justice of the Supreme Judicial Court of the state of Massachusetts, now an associate justice of the Supreme Court of the United States."[58] A case arose in Pennsylvania where a person injured by a collision of two street-railway cars had received compensation from the carrying company and executed a release, and thereupon brought suit against the other company, alleging that it was the real wrong-doer and solely in fault. The supreme court of that state remarked that "a case so unique as this might be supposed to stand alone in the books," but found "its exact counterpart" in a decision of the Supreme Court of California, in which a "vigorous opinion" was rendered, which the Pennsylvania court approved and followed.[59] A still more forcible illustration may be found in an early decision of the New York Court of Appeals to the effect that the right of a littoral owner to have unobstructed access to the water is not a property right of which he cannot be deprived without compensation.[60] This decision was based chiefly if not entirely on an English decision which was afterwards reversed by the House of Lords, and, after causing great trouble and uncertainty to the courts, was finally overruled. But in the mean time, it had been relied on and followed by the courts of three other states—New Jersey, Iowa, and West Vir-

[57] Tomlinson v. Warner, 9 Ohio, 103.

[58] In re Leonard, 12 Or. 93, 6 Pac. 426, 53 Am. Rep. 323.

[59] Seither v. Philadelphia Traction Co., 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905, citing Tompkins v. Clay St. R. Co., 66 Cal. 165, 4 Pac. 1165.

[60] Gould v. Hudson River R. Co., 6 N. Y. 522.

ginia—when the same question was presented to them for the first time, and was the basis on which (temporarily at least) the law of those commonwealths was settled as to the point involved.[61] So again, in 1881 the Supreme Court of Texas announced a hitherto unknown rule of law, respecting the liability of a telegraph company for negligence in the transmission of a message, where no damage to the plaintiff was shown except "mental anguish," grief, or injury to his feelings. There was at the time no direct adjudication upon the precise question to be found anywhere in the books. The few decisions cited by the Texas court were not in point, since they all involved some proven damage to the person, contract rights, or reputation. The court really based its ruling on the unsupported statement of the learned authors of a certain valuable text-book. But this ruling was not only followed in the same state, but furnished the unique starting point for a similar line of decisions in at least five other states.[62]

Reasons for Approving and Following Decision from Another State

The following statements and quotations are intended to show in concrete form some of the various reasons which have actually induced the appellate court of one state to rely upon and follow a decision of the highest court of another state. "A strikingly analogous case arose before the Supreme Court of Tennessee." [63] "The case is, in its facts and features, almost exactly similar to the case under re-

[61] Stevens v. Paterson & N. R. Co., 34 N. J. Law, 532, 3 Am. Rep. 269; Tomlin v. Dubuque, B. & M. R. Co., 32 Iowa, 106, 7 Am. Rep. 176; Town of Ravenswood v. Flemings, 22 W. Va. 52, 46 Am. Rep. 485. And see Black's Pomeroy on Water Rights, § 245 et seq.

[62] So Relle v. Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805; Chapman v. Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880; Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; Reese v. Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 9 L. R. A 669, 22 Am. St. Rep. 883; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

[63] State ex rel. Forsythe v. Judge, 42 La. Ann. 1104, 8 South. 305.

view."[64] "A case precisely in point with the one under consideration has recently been determined" by the supreme court of another state.[65] "We have quoted thus largely from the Illinois case because of the striking resemblance of many features of that case to those presented in the one we have in hand."[66] The case cited is "a leading case which has been recognized as authority in many of the states."[67] The opinion in the case cited "has exerted great influence in controlling the course of decisions in this country; in several states it has been followed, and the English courts have cited it with marked commendation."[68] "This is a leading case, the ruling being unanimous. * * * The same ruling has been repeatedly made in that state."[69] The case cited "was determined upon a very learned discussion of the question by both bar and court."[70] "On account of the magnitude of the interests at stake, the case received in the court of appeals from both counsel and court an elaborate and exhaustive study and discussion. There is no reason to suppose that any argument or authority of any value, bearing upon the subject, can have escaped a thorough scrutiny and consideration. The conclusion of so able and learned a tribunal, so reached, though not binding on us merely as authority, is eminently entitled to respect, and it seems to us to be correct."[71] "This question has been so ably and exhaustively treated in an opinion delivered by Dillon, J., while a member of the Supreme Court of Iowa, that it would be a waste of time upon our part to attempt to add anything

[64] Orme v. City of Richmond, 79 Va. 86.

[65] Miller v. Anderson, 43 Ohio St. 473, 3 N. E. 605, 54 Am. Rep. 823.

[66] Rochester v. Armour, 92 Ala. 432, 8 South. 780.

[67] Staton v. Norfolk & C. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838.

[68] Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, speaking of the decision in Farwell v. Boston & W. R. Corp., 4 Metc. (Mass.) 49, 38 Am. Dec. 339, on the doctrine of fellow-servants.

[69] Leete v. State Bank of St. Louis, 115 Mo. 184, 21 S. W. 788.

[70] Perkins v. Morse, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780.

[71] Wood v. Hammond, 16 R. I. 98, 17 Atl. 324.

to what is there said." [72] "The cogent reasoning" of the judge delivering the opinion in a case cited from another state "furnishes the most ample support for the positions we have taken in this discussion." [73] "We may well adopt this reasoning of the Minnesota court as covering the entire ground in a few words." [74] The principles of the case cited "were not only followed, but were emphatically approved" by the Supreme Court of the United States.[75] "The same view is taken by the New Jersey court of errors and appeals, which is very high authority in matters of equity jurisprudence." [76] Respect is paid to "the deserved reputation of the court and the great ability of its reasoning." [77] The opinion was delivered by Chief Justice Shaw of Massachusetts,[78] by Chancellor Walworth of New York,[79] or "at a period when such jurists as Judge Denio adorned the bench." [80]

Reasons for Disapproving Decision from Another State

On the other hand, the following may be cited as examples of the particular reasons which have induced the courts of one state to disapprove decisions cited to them from other states and decline to follow them. That the rule laid down "sacrifices justice to form." [81] That the decision in question "seems to be against reason, to violate the principles of justice and equity, and not to be required by any sound public policy." [82] That the decision was rendered "by a divided court of three to four, and has since been the subject of much adverse criticism," and that its authority as a precedent, even in the state where rendered,

[72] Buford v. Smith, 2 Tex. Civ. App. 178, 21 S. W. 168.
[73] Fairfield v. Lawson, 50 Conn. 501, 47 Am. Rep. 669.
[74] Nalley v. Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47.
[75] Rochester v. Armour, 92 Ala. 432, 8 South. 780.
[76] Cartwright v. Bamberger, 90 Ala. 405, 8 South. 264.
[77] Phelps v. Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755.
[78] Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787.
[79] Ah Thaie v. Quan Wan, 3 Cal. 216.
[80] Leete v. State Bank of St. Louis, 115 Mo. 184, 21 S. W. 788.
[81] Sullivan v. McMillan, 26 Fla. 543, 8 South. 450.
[82] Hunt v. Hunt, 45 N. J. Eq. 360, 19 Atl. 623.

"has been much shaken." [83] That "it does not state the better doctrine, and many of the decisions from other courts upon which it relies for support are not in line with it upon the facts." [84] That the opinion is "very meager, unreasoned, and unsupported." [85] That "the courts rendering those decisions have sufficiently distinguished and explained them." [86] That "this case, though meeting with seeming approval in [one other], has been disapproved by other high authorities," and is spoken of as "a case not likely to be followed." [87] That the case in question has been pronounced "erroneously decided," or cited "without commendation if not with dissent," by text-writers of acknowledged eminence.[88] That the decision was made upon an interlocutory order on a special application.[89]

Divergent Statutes or Different Legal Systems

It should be noted that a decision which is good authority in the state where it was rendered may be of no value in another jurisdiction on account of differences in the legal systems of the two states. For instance, if the judgment in a case turns entirely upon the provisions of a statute, it will not be available as authority in another state unless the statute law of the latter jurisdiction is substantially the same in this respect.[90] So also, if the decision is made

[83] Thomas v. People, to Use of Joiner, 107 Ill. 517, 47 Am. Rep. 458.

[84] Carr v. Eel River & E. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354.

[85] Alabama G. S. Ry. Co. v. Hill, 90 Ala. 71, 8 South. 90, 9 L. R. A. 442, 24 Am. St. Rep. 764.

[86] Adams v. Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789.

[87] Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331.

[88] Wood v. State, 47 N. J. Law, 461, 1 Atl. 509; Town of Palatine v. Kreuger, 121 Ill. 72, 12 N. E. 75.

[89] Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460.

[90] See Wilson v. White, 133 Ind. 614, 33 N. E. 361, 19 L. R. A. 581, where the court, in speaking of certain decisions from other states, remarked: "It is obvious these cases, whether right or wrong in the general principle announced by them, can have no controlling influence in the decision of this case, because our statute differs so widely from those involved there." So also in Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741, it was observed that "the attachment laws of

in accordance with some local custom or some settled peculiarity of the law of the state in which it was given, or even where the foreign case is based upon some widely divergent view of the main subject. Thus, for example, it has always been held in Texas that a mortgage is merely a security for a debt, and consequently the decisions in those states where it is considered as a conveyance of an estate are entirely inapplicable, when the question concerns the relative rights of the mortgagor and mortgagee, as, in regard to the severance of the crops.[91] So also, in Alabama it is said: "The doctrine of comparative negligence prevails in Illinois, and it would seem that rulings in that state on the doctrine of contributory negligence should be less controlling with us than the decisions of other states which, like our own, repudiate that doctrine." [92]

Overruled Cases

Although, as an original authority, a decision which has been reversed or overruled is of little value, the case is somewhat different if it continued for some time to stand as good law and was not overturned until after it had been relied on and followed in another state. In that event, when the decision is afterwards overruled by the court which rendered it, it does not follow that the opinion which relied upon it must also be discredited as an authority. The question will then be whether the original decision or that which overruled it is the more worthy of

the several states differ each from the other in so many particulars that without the utmost caution in comparing their provisions with our own, we are in constant danger of being led astray or unduly influenced by decisions apparently in point, but in reality resting upon a different basis."

[91] Willis v. Moore, 59 Tex. 628, 46 Am. Rep. 284. In Oklahoma, it is said that, since the common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, in aid of the general statutes, is in force in that state, the fact precludes the following of decisions based upon the differing system of the civil law. Chicago, R. I. & P. Ry. Co. v. Groves, 20 Okl. 101, 93 Pac. 755, 22 L. R. A. (N. S.) 802.

[92] Louisville & N. R. Co. v. Webb, 90 Ala. 185, 8 South. 518, 11 L. R. A. 674.

respect and adherence, since neither is binding in the character of a precedent in the other state. If the court which followed the original ruling should continue of the opinion that it was right, and that the overruling case was not correctly decided, it will be justified in adhering to its own decisions.[93]

Decisions of Parent State

Where a state has been formed out of part of the territory of an older state,—as in the case of Maine, West Virginia, and the District of Columbia, respectively separated from the states of Massachusetts, Virginia, and Maryland,—judicial decisions rendered in the parent state, up to the time of the separation, are in the direct line of authority in the new state and to be regarded as binding precedents, and they will generally be followed without inquiry into their soundness or the reasons on which they were based.[94] But decisions of the courts of the old state, after the erection of the new state, are upon a different footing. They are entitled to respectful consideration, and, on account of the usual and general similarity of the laws and institutions of the two states, they will probably be treated with a higher degree of deference than would be accorded to decisions proceeding from any third state. But they are not imperatively binding upon the courts of the new state, and it is no violation of the rule of stare decisis to disregard them or depart from them.[95]

DECISIONS OF INFERIOR COURTS

123. A decision of an inferior court of another state is ordinarily entitled to very little consideration, either as evidence of the law of that state or as an authority on general principles of law.

[93] Clarke v. Western Assur. Co., 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821.

[94] Clarke v. Figgins, 27 W. Va. 663; Pinkham v. Crocker, 77 Me. 563, 1 Atl. 827.

[95] Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013.

Where a court is called upon to interpret and apply the statutory or local law of another state, it will, as we have already stated, be guided and indeed controlled by the pertinent decisions of the court of last resort in that state in similar cases. But in the absence of such authoritative expositions of the law, the decisions of the inferior courts of that state are generally held in very slight esteem, for the obvious reason that they are liable to be reversed or modified by their own court of last resort. Such decisions may indeed throw light on the meaning of an obscure or doubtful statute or on a local custom or peculiar institution, and in such cases their aid is not wholly to be rejected. But neither are they to be implicitly followed. They have no conclusive force and are not binding as precedents, and their citation does not relieve the court trying the case of the necessity of forming an independent judgment upon the question involved. This is especially the case when conflicting decisions of various inferior courts of the foreign state are brought forward.[96] And when a court of first instance, being obliged to construe a statute of another state, finds itself confronted with a decision of an inferior court of that state and a contrary decision on the same statute by its own appellate court, it must follow the latter and not the former.[97]

Where the question is one of general law, and decisions from other states are consulted not as binding precedents, but merely as persuasive authority, it is ordinarily the case that very little weight or influence is conceded to the judgments of inferior courts. In some states they will not be listened to at all.[98] But generally it is considered permissible and proper to refer to them, while at the same time very slight importance is attached to them, and they are very easily dismissed if found to be in conflict with decisions of higher courts in other states.[99] This low estimate

[96] Kilgore v. Bulkley, 14 Conn. 362.

[97] In re Robertson's Will, 23 Misc. Rep. 450, 51 N. Y. Supp. 502.

[98] Dickinson v. Coates, 79 Mo. 250, 49 Am. Rep. 228.

[99] Saveland v. Fidelity & C. Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863. And see Kauffman v. Peacock, 115 Ill. 212, 3 N. E. 749, where it was said: "We are not inclined to follow the rule laid

of the value of judgments and decisions of nisi prius courts may be supposed to rest upon two principal considerations: First, their infirmity or want of finality in view of their liability to reversal by the appellate court of the same system; and second, the supposition (which is not always well founded) that these courts are presided over by judges who do not possess the learning of the superior courts, and that there may be a lack of thorough and exhaustive consideration in their judgments. Still, considerable weight is sometimes allowed to a judgment of a lower court of another system, when its reasoning is such as to commend its conclusions to the mind of the court before which it is cited. And if it has been approved by the appellate court which could have reversed or modified it, and perhaps by the highest courts of other states also, it gains greatly in authority. As an illustration we may mention an opinion delivered by the Court of Common Pleas of Philadelphia, which was approved and adopted by the Supreme Court of Pennsylvania, and in that form approved by the Supreme Court of Illinois, after which it was quoted, approved, and implicitly followed by the Supreme Court of Colorado.[100] Also it should be remarked

down in the cases found in Barbour's Reports. The court in which the cases were decided was one of learning and ability, but it was not a court of last resort." And see Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101, where the court observed: "A case is referred to as reported in Burn's Justice. We cannot ascertain the facts of that case, but we know that it was the decision of the court of quarter sessions [in Pennsylvania] and therefore of but little value as an authority." In the same case, speaking of decisions of the supreme courts of several states and of the United States circuit court, which were opposed only by the decision of a nisi prius court in Pennsylvania, the court said: "We have no doubt that the authority of these decisions, waiving all other considerations but the rank and standing of the courts, is much weightier than that of the court of quarter sessions of Philadelphia." As to the value of decisions of inferior courts as precedents generally, see supra, p. 118. As to the authority of decisions of inferior state courts in the courts of the United States, see infra, p. 469.

[100] German Nat. Bank v. Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247, following Merchants' Nat. Bank v. Goodman, 109 Pa. 428, 2 Atl. 687, 58 Am. Rep. 728, and Drovers' Nat. Bank v. Anglo-

that cases sometimes arise in which the question involved is so novel that no decision by any appellate court can be found bearing upon it. Where this happens, a court of last resort is fully justified in referring to decisions of inferior courts in its own or other states, and its own conclusion may be considerably strengthened by their support, however frail they might have been considered in the presence of higher authorities. For example, in a case before the Supreme Court of Pennsylvania involving the construction of a fire-escape law, it was said: "This is a case of first impression in this state, and we have but little authority on the subject. * * * A similar law exists, however, in the state of Ohio, and in the recent case of Lee v. Kirby, decided in the Superior Court of Cincinnati, a similar construction was placed on the word 'owner.' * * * And it is not without weight that three of the courts of common pleas for the county of Philadelphia have adopted the same view." [101]

CONFORMING DECISIONS TO GENERAL CURRENT OF AUTHORITY

124. For the sake of uniformity, as well as out of respect for authority, the supreme court of a state should settle new questions in accordance with the general trend or current of judicial decisions in other states, if such a unanimity of opinion in other jurisdictions is plainly to be observed and widely extended. Where the matter is important and the general prevalence of the same rule of law is highly desirable, it is also proper to pursue this course though it may involve overruling one or more of the court's previous decisions.

We have hitherto considered the citation and authority of single decisions from other states, or of decisions from

American Packing & Provision Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855.

[101] Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201.

a single foreign jurisdiction, and shown that they are not of imperatively controlling force except in certain cases where the law of a foreign state must be ascertained and applied. It is equally true that the concurrence of single decisions or of lines of decisions from various other states, however numerous, upon a given rule or principle of law, does not raise any of them to the rank of a direct precedent. Yet the cumulative force of a general trend or current of judicial opinion in various other states is so great that no court will lightly disregard it, especially if such a current is strong and wide. On the contrary, if the question is a new one in the particular state, it is the plain duty of the court to conform its judgment to the settled opinion elsewhere, unless prevented by some positive statutory injunction or other very cogent reason.[102] This is based on two important considerations. First, it is greatly to be desired that the laws and practice of the various states should be made uniform and harmonious, as far as it is in the power of the courts to mould them to that end. Second, if the same rule of law has been laid down and adhered to in numerous states, there is a very strong presumption that it is correct and sound in principle, and this presumption increases in force in proportion both to the length of time the rule has been established and recognized and to the number of different jurisdictions in which it is admitted to be law.

Even where the case is not one of first impression, there may be instances in which the application of this principle

[102] Thompson v. Mylne, 4 La. Ann. 206; Dubuch v. Goudchaux, 6 La. Ann. 780; State ex rel. Coogan v. Barbour, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65 ("these views are believed to be in harmony with the best and most carefully considered cases"); Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194 ("the current of modern authority tends strongly in the direction indicated"); Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186 ("the decisions of the courts of many states, promulgated by the most learned judges of those states, hold," etc.); Cunningham v. Evansville & T. H. R. Co., 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683 ("so the law seems to be uniformly settled elsewhere, and we know of no sufficient reason for adopting a different rule of decision in this state").

would be entirely right. Thus, a case in Indiana presented a question as to which the supreme court of that state said: "Our adjudged cases are in the utmost confusion; it is utterly impossible to reconcile them." Having therefore to settle the rule, the court decided in accordance with what it considered the "decided weight of authority" in other states.[103] So the Supreme Court of New York, in speaking of one of its own former decisions which was cited to it as a precedent, but which it declined to follow because it was not deliberately considered and adjudged, remarked: "We may also add that that case has been reviewed, and its conclusions disapproved, by the courts of Massachusetts, Connecticut, and Vermont," so that, in overruling it, the court did but conform to the general opinion prevailing elsewhere.[104] Again, where the question concerns a general principle of commercial law, which is well settled and long established by the course of decisions in other states, the court should rather decide in accordance with those rulings than with a single previous decision of its own which was not only an innovation but appears to be erroneous in law and mischievous in its consequences. This was stated by the Supreme Court of California in an opinion in the course of which it said: "In overruling the case of Bryan v. Berry, we feel less reluctance because we think the principle there laid down is of injurious import. We think that principles of commercial law long established and maintained by a consistent course of decision in the other states should not be disturbed; that the tendency of such disturbance, in any instance, is to confusion and uncertainty, and gives rise to perplexing litigation and doubts and uneasiness in the public mind. Almost any general rule governing commercial transactions, if it has been long and consistently upheld as a part of the general system, is better than a rule superseding it, though the latter were much better as an original proposition. * * * The commercial law has

[103] Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405.

[104] Harris v. Clark, 2 Barb. 101.

a system of its own, built up by centuries and the wisdom of learned jurists all over the world. It is not local, but applicable to all the states with few modifications; and California, eminently commercial in its character and in close commercial connection with the other states, finds its interest and safety in adhering to the well-settled general rules which prevail in those states, as the laws of trade." [105]

But the converse of this proposition is equally true. That is to say, the rule of law on a given subject in a given state may have been so thoroughly settled by a course of uniform decisions and so generally acquiesced in, that it would be injurious and improper to disturb it, though it does not accord with the general current of authority elsewhere. "I am aware," said a learned judge in Missouri, "that there are to be found most respectable cases in other states holding a doctrine somewhat different from the rulings of this court, and were the question res nova, they might be entitled to serious consideration. But it is no longer debatable or open, and we are unwilling to unsettle our own laws because some other courts have entertained different views." [106]

CONFLICTING DECISIONS OF OTHER STATES

125. Where no binding precedent exists for the determination of a particular cause, and the decisions in other states, upon the question involved, are in irreconcilable conflict, the court will decide in accordance with the preponderance of authority or the general trend of the more recent cases, or will adopt that rule which appears to it to be founded on the better reasons or to be most conformable to the principles of justice and equity, unless, for

[105] Aud v. Magruder, 10 Cal. 282, 291.

[106] Reed v. Ownby, 44 Mo. 206. And see Brown v. Chesapeake & O. Ry. Co., 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717.

special reasons, the decisions in some particular state are preferred to all others and followed as a guide.

Preponderance of Authority

Where the rule or principle of law involved in a particular controversy has been the subject of adjudication in numerous states, and their courts have taken such widely divergent views of the question as to put their decisions into irreconcilable conflict, a court to which the question is presented will first of all consult its own previous decisions, or, if it is an inferior court, those of the court or courts having appellate jurisdiction over it. If a ruling can thus be found which was made in an identical or similar case, or which announced a principle broad enough to cover the case at bar, it will be followed as a precedent, without attention to the conflict of authority elsewhere.[107] But in the absence of a direct precedent of this kind, and where it is logically impossible to bring the decisions of the various other states into any substantial harmony or agreement, the court should and will decide the case before it in accordance with what it perceives to be the "weight of authority," or the "general current of authority," or the "decided preponderance of authority," all of these phrases having substantially the same meaning. This will sufficiently appear from the cases cited in the margin,[108]

[107] Atwater v. Perkins, 51 Conn. 188.

[108] Windle v. Bonebrake (C. C.) 23 Fed. 165; Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38; Guardian Fire & Life Assur. Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; Rhoads v. City of Metropolis, 144 Ill. 580, 33 N. E. 1092, 36 Am. St. Rep. 468; Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Webster v. American Bible Soc., 50 Ohio St. 1, 33 N. E. 297; Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200; Oxnard v. Varnum, 111 Pa. 193, 2 Atl. 224, 56 Am. Rep. 255; Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. 249; Welch v. Boston & P. R. Corp., 14 R. I. 609; Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224; Sheffey's Ex'r v. Gardiner, 79 Va. 313.

which have been selected as examples of the application of this rule, and not as an exhaustive list of the instances in which it has been applied.

Looking at the reverse of this principle,—or regarding the same principle from a different angle,—it may be said that a court will almost invariably refuse to follow an isolated decision in another state, or a few sporadic cases in other jurisdictions, or a line of decisions confined to a single other state, where they are plainly seen to be opposed in principle to a large body of well-considered adjudications elsewhere.[109]

This much is quite plain, but beyond this it is by no means easy to say exactly what constitutes the "weight of authority" or a "decided preponderance of authority." If the decisions on one side of the question are few in number, while those on the other side are many, this circumstance alone may suffice to show to which side the balance should incline. But in general we cannot suppose a merely numerical preponderance to be intended. Like witnesses, in the well-known maxim, precedents are to be "weighed, not counted." Regard is to be paid to their persuasive force and to their accordance with sound legal reason and the general principles of the law. Hence a body of decisions arrayed on one side of a disputed question, though numerically inferior to those supporting the opposite view, may constitute a preponderating authority if they proceed from courts eminently distinguished for their learning and ability, if they are powerfully reasoned and logically convincing, and if they commend themselves to the general sense of right, justice, and sound public policy. On the other hand, numbers add nothing to the strength of a body of decisions promulgated by courts of only local reputation, which have blindly followed each other without independent investigation of the subject, or which are unsatisfactory in their reasoning or citation of authorities, or which strike the judicial mind as illogical, unconvincing, or ill adapted

[109] Georgia Pac. Ry. Co. v. Underwood, 90 Ala. 49, 8 South. 116, 24 Am. St. Rep. 756; Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Corrigan v. City of Chicago,

to subserve the ends of justice. We shall have more to say of these considerations hereafter. At present it may suffice to adduce a few illustrations of their working in practice. In a case before the Supreme Court of the United States, it was said: "This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other states. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are lawful and valid, as well against third persons as against the parties to the contract." [110] For another example, reference may be made to a case in Nebraska, in which the question was as to the rate of interest on a promissory note after maturity and until judgment. The court said that it had not previously passed upon this question, but that it had been decided by the Supreme Court of the United States and by the courts of last resort in many of the states. Of the decision of the federal court it was remarked that it "presented an illustration of those hard cases which are sometimes said to make bad precedents." It was pointed out that this decision had been followed in seven enumerated states; that the question was still an open one in two others; and that a contrary conclusion had been reached in thirteen other states. The court in Nebraska now ruled in accordance with the doctrine of the last mentioned group of states, not, apparently, on the ground of their constituting a numerical majority, but on conviction that their decisions were right in principle. Two cases were specially

144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; Standard Implement Co. v. Parlin & Orendorff Co., 51 Kan. 544, 33 Pac. 360; Nash v. Simpson, 78 Me. 142, 3 Atl. 53; State v. Nevin, 19 Nev. 162, 7 Pac. 650, 3 Am. St. Rep. 873; House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813.

[110] Harkness v. Russell & Co., 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285.

selected for comment and approval. One of these was from Massachusetts, and it was remarked that "a very able and exhaustive opinion" was rendered, in which "the learned judge cites all the cases, American and English," and reaches a conclusion in harmony with "the recent decisions of the English courts" and with a later declaration of the Supreme Court of the United States. The other case was one from Wisconsin, and was described as being "the best reasoned case," and one in which the opinion of the court "answers every objection and leaves it perfectly clear to my mind that the rule last stated is the correct one, and that none other ought to be adopted in this state." [111]

Importance of Recent Cases

Another consideration which is influential in weighing the relative value of conflicting lines of decisions from different states is their rank in order of time. The earlier cases dealing with a judicial problem are not likely to have discussed it so thoroughly or so intelligently as those decisions rendered after it has been exhaustively explored by many courts and when the subject is clearly illuminated by their researches. And again, if there is, as to the particular subject, a progressive movement away from the old ideas and criteria and towards new and juster standards, the evidence of it is to be sought and found in the later decisions. The influence of this argument may be seen in the following quotation from an opinion of the Supreme Court of North Carolina: "It is true that some of the cases from other states, cited by the defendant's counsel, go to the extraordinary length of sustaining his proposition; but these are not in accord with the more recent and better authorities, and they are rapidly being submerged by the steady and increasing current of judicial decisions." [112]

[111] Kellogg v. Lavender, 15 Neb. 256, 18 N. W. 38, 48 Am. Rep. 339.

[112] Staton v. Norfolk & C. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. And see similar remarks in Austin v. Wacks, 30 Minn. 335, 15 N. W. 409; State v. McGuire, 24 Or. 366, 33 Pac. 666, 21 L. R. A. 478; Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200.

Cases Supported by "Better Reason"

When the courts are compelled to make a choice between conflicting lines of decisions from other states, we very often find them stating as the basis of their decision that the view adopted is "supported by the better reason," or "founded on" or "sustained by the better reasoning," or that it is "more reasonable" or "more conformable to reason."[118] In this connection, the word "reason" may be taken in its logical sense, and imply the correct deduction of right conclusions from sound premises. But especially it means good legal argumentation, that is, the application of well-established general rules, maxims, and principles of the law, as well as sound legal analogies, to a new state of facts, in such a manner as to convince the legal mind that the problem is well apprehended, the materials for its solution well chosen, the process of applying them correct, and the result inevitable. And more than this, when the courts speak of the "better reason," it is frequently evident that they mean to use the term in a still wider sense. It is sometimes said that "the law is the perfection of human reason;" and here it is apparent that the term must mean conformity to the general ethical standards of the time, or to what the average mind, enlightened by the teachings of morality and guided by good common sense, would regard as fair, sensible, and just. A pertinent illustration may be found in a case in Ohio, in which the question turned upon the right to resist a sheriff making an unjustifiable levy. The court had no precedent before it which it was bound to follow, and therefore consulted the decisions in other states. Two decisions in Vermont were on one side of the question, and one in Massachusetts and one in Illinois on the other. The Vermont decisions were followed, because the Ohio court considered their reasoning to be more sound and convincing, and their doctrine more in harmony with the modern views of the rights of public officers and the means of obtaining re-

[118] Windle v. Bonebrake (C. C.) 23 Fed. 165; Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38; Woolley v. Lyon, 115 Ill. 296, 6 N. E. 30; Day v. Wallace, 144 Ill. 256, 33 N. E. 185, 36 Am. St. Rep. 424;

dress for their unlawful acts, than the decisions in the other states mentioned.[114]

If it is found that one of two or more divergent views of the same question is supported not only by the better reason but also by the preponderance of authority (as explained above), this is of course a very strong inducement to adopt and follow it. Yet the courts sometimes decide a new case entirely against the weight of authority in other states, on the ground that the better reason is not with the preponderating authorities but with the dissentient decisions. Evidently a mere numerical majority of decided cases should weigh nothing against a court's conviction that they are legally in the wrong and that the views of the minority are based on sound reason. Thus, we find the Supreme Court of Nebraska saying: "While perhaps a considerable majority of the reported cases involving the question have held," etc., "yet there are very respectable authorities to the contrary," and the rule sanctioned by the majority of the decisions should be rejected because "illogical." [115]

Equitable and Moral Considerations

Where the decisions of other states are in irreconcilable conflict, and neither side of a disputed question can be said to be supported by an overwhelming preponderance of authority, the courts will incline to adopt that view which appears to them to be most in harmony with the principles of justice and equity, most reasonable and fair to all the persons who may be affected by the rule to be laid down, best in accord with the analogies of the law, most stable and uniform, or based on the soundest considerations of public policy.[116] The application of these rules may suf-

Tinsley v. Hoskins, 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801; Evants v. Strode's Adm'r, 11 Ohio, 480, 38 Am. Dec. 744; Webster v. American Bible Soc., 50 Ohio St. 1, 33 N. E. 297.

[114] Faris v. State, 3 Ohio St. 159.

[115] Mattis v. Boggs, 19 Neb. 698, 28 N. W. 325.

[116] Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Gitchell v. People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; State v. Guthrie, 17 Neb. 113, 22 N. W. 77; Allen v.

ficiently appear from the following quotations from opinions. "There are plenty of adjudications by courts of great authority sustaining both of these propositions. The question is now presented to this court for the first time; and we must choose between these conflicting lines of authority, and adopt the rule which seems to us to rest on the soundest principles and which best accords with the analogies of the law." [117] "The case [cited] seems to teach a different doctrine, but it introduces a refinement tending to defeat rather than promote right, and is in conflict with all the other cases we have found." [118] "The rule best adapted to the proper conduct of business transactions lies between the two extremes." [119] "The rule announced in Kentucky, Iowa, and South Carolina is not only commended by its justice and by analogy to other well-settled principles, but possesses the advantage of stability and uniformity." [120] "After a careful review of all the authorities at our disposal, while we find that some of the courts have so construed the assignment laws of the several states, * * * yet we are of the opinion that such construction is strained and not in harmony with the intention of the lawmakers who enacted the statutes." [121]

Decisions of Particular Courts Preferred

In the absence of direct and binding precedents on a given question, and especially where the decisions in other states are in conflict, a court will often base its determination of the question on the decisions of some one other state, in preference to, or exclusion of, those of all others. The reasons which may influence it to make such a choice are many and various, and do not admit of being reduced to a set of rules. But the following general considerations will

Rundle, 50 Conn. 9, 47 Am. Rep. 599; Evants v. Strode's Adm'r, 11 Ohio, 480, 38 Am. Dec. 744.

[117] Curran v. Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827.

[118] Bowen v. Tipton, 64 Md. 275, 1 Atl. 861.

[119] Jordan v. Pickett, 78 Ala. 331.

[120] Brooks v. Black, 68 Miss. 161, 8 South. 332, 11 L. R. A. 176, 24 Am. St. Rep. 259.

[121] Jaffray v. Wolf, 1 Okl. 312, 33 Pac. 945.

be found pertinent and well-supported by the actual course of decisions. In the first place, if there exists a close similarity between the laws and institutions of two states, the courts of either will be disposed to pay much more heed to the decisions of the other than to adjudications from any third state. We have already spoken of this natural preference in the case of a new state formed out of territory formerly belonging to an older or parent state. It is the same where the general body of statute law of a given state is mainly copied from or modelled upon that of another state. On all questions of practice under the revised codes of procedure, the decisions of the New York courts are of the highest authority, because the codes of nearly all the other states which have reformed and codified their procedure are based on and closely imitated from that of New York. So also where the body of the substantive law has been codified, if it is found that the code has been chiefly copied from that of another state, or that a general and close similarity exists, the decisions of that state will be received with more favor and listened to with greater respect than those cited from a state where the common law still prevails. And conversely, in a state where the great body of the law relating to persons and property is based on and has grown out of the common law, a natural and decided preference will be given to decisions from other "common-law states" over those proceeding from the "code states."

Geographical contiguity has but little to do with this question, yet it is not wholly without influence. Any attempt to formulate a general rule on this point would easily be frustrated by specific contradictory examples. Yet it is perhaps safe to state in general terms that the superior courts of most of the older states of the east show a tendency to prefer the decisions of their immediate neighbors, along with those of the United States Supreme Court and the English courts, while the courts of the western states freely consult decisions from all over the Union and select the authorities on which to base their decisions with an absolutely impartial catholicity. Yet there are cases

in which mere proximity may furnish a perfectly valid reason for following the decisions of some other state in particular. A court which is called on to decide a new question may incline to settle the law for its state in accordance with the rules prevailing in contiguous or nearby states, because its people as a whole may have more intimate or more constant trade and business relations with the citizens of those other states, or because the similarity of geographic and climatic conditions may make the leading industries or kinds of business in the state the same as those of its nearest neighbors (e. g., mining, stock raising, lumbering, irrigational agriculture), or because proceedings in its courts may more often involve the rights or interests of people of adjoining states than of those more remote. Also a disposition to conform to the law of contiguous states is sometimes observed in matters which do not form a part of the substantive law, but relate merely to practice or procedure; as in a case in Arizona, where, speaking of the rule relating to the proper limits of cross-examination of witnesses, the court said: "The Supreme Court of the United States has discarded the English rule, and has furnished some suggestions for a new rule, which different states have accepted as the basis on which to build up what is called the 'American rule.' These suggestions have been adopted in California and Nevada, and our intimate relations with these states lead us to believe that, on the whole, it will be more satisfactory to all parties interested to have our practice in harmony with theirs." [122]

Irrespective of such considerations as these, there are certain state courts whose decisions have always been (or at some period in their history have been) so universally esteemed for their learning, thoroughness, and justice that their authority far outweighs that of other less eminent courts, and whose adjudications are received with deference and treated with high consideration in all other courts, whether near or remote. This point has been discussed in the first chapter of this book, to which reference may be

[122] Rush v. French, 1 Ariz. 99, 25 Pac. 816.

made for a fuller elucidation of the principle involved as also for pertinent illustrations. [123]

But even when due allowance is made for the legitimate influence of all these various reasons which may theoretically be supposed to induce the court to prefer and follow the decisions from a certain other state, rather than decisions from elsewhere, it is probably safe to say that the consideration which will ultimately determine its choice is the strength and convincing character of some particular decision or line of decisions cited to it. At least, all other considerations will break down in the face of a decision which appeals to the mind of the court as thoroughly satisfactory and convincing. This is illustrated by a ruling of the Supreme Court of Washington, where, on the question of the negotiability of notes of a certain kind, it appeared that the decisions in various other states were in utter and hopeless conflict. The court said: "We shall not attempt any review of the cases on either side, but shall content ourselves with reference to a single case" decided by the Supreme Court of Alabama. In this case, "the judge who pronounced the opinion of the court entered upon the consideration of this question with a confessed bias in favor of the proposition that notes of this kind are not negotiable; but after a more careful investigation into the adjudged cases, and especially a more critical consideration of the reasons upon which the divergent conclusions of other courts were made to rest, he had become convinced that the rule that such notes are negotiable was the proper one. In the course of the opinion in this case, a large number of authorities upon each side of the proposition are cited and commented upon, and the opinion gives evidence of a most careful examination of the question, and we are satisfied with the result thereof." [124]

Decision "on Principle"

Occasionally it happens that a court which is under the necessity of deciding a new question, and which finds the

[123] Supra, p. 113.

[124] Second Nat. Bank of Colfax v. Anglin, 6 Wash. 403, 33 Pac. 1056, following Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832.

decisions in the other states to be in irreconcilable conflict, will reject them all, and decide the cause in accordance with the general analogies of the law, or in accordance with its own ideas of justice, convenience, and sound public policy. This is what is called deciding "on principle," and the process has been fully described in an earlier chapter.[125] But a few illustrations may be here added, in the form of quotations from the reports, to show the process in action. "The authorities on the point are numerous and in irreconcilable conflict. * * * The decisions of this court on the matter in hand are not such as to stand between us and the adoption of either of the views above set forth. Aside from dicta, there are but two cases which bear upon the point, and the tendencies of these are in opposite directions if we are to construe them by the language of the opinions and without reference to the particular facts of the cases. * * * We are left therefore to choose between the two doctrines on principle and unfettered by adjudications to constrain us towards either." [126] "The cases above cited are not intended to be exhaustive on either side of the proposition. I shall not attempt a reconciliation where reconciliation is impossible; but as the question is new in this state, the court is left to adopt such views as appear to rest upon principle." [127] "Finding this contrariety of opinion in the courts of last resort, we naturally recur to the text-writers to ascertain how the scale ought to be adjusted and what held to be the better opinion. But instead of resolving our doubts, we find the conflict renewed with an energy almost acrimonious in its vigor. * * * Amidst this great contrariety of opinion, we must draw our conclusions in conformity with the spirit of our own decisions, and according to the dictates of a sound adherence to general principles." [128]

[125] Supra, p. 152.

[126] Hayes v. Westcott, 91 Ala. 143, 8 South. 337, 11 L. R. A. 488, 24 Am. St. Rep. 875.

[127] Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708.

[128] Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17.

CHAPTER XI

DECISIONS OF COURTS OF FOREIGN COUNTRIES

126. English Decisions on the Common Law.
127. Adopted British Statutes.
128. English Equity Cases.
129. English Ecclesiastical Cases.
130. Value of English Precedents in Novel and Unsettled Cases.
131. English Decisions Locally Inapplicable.
132. Decisions of Other Foreign Countries.

ENGLISH DECISIONS ON THE COMMON LAW

126. Decisions of the English courts upon the common law or the general principles of jurisprudence, if rendered before 1776, are of high authority and have the full force of judicial precedents in the American courts; but if rendered after that date they are not of controlling authority, though they may properly be followed, if deemed satisfactory and convincing and not in conflict with any more imperative precedent.

General Rule

During the colonial period of American history, and before the Declaration of Independence, the English common law was in force throughout the thirteen colonies, substantially the same as in the parent country, and the superior courts of Great Britain were naturally and necessarily regarded as the authoritative expounders of that law, and their decisions, upon all questions growing out of it, were of controlling authority. Hence, in so far as any portions of the common law may still remain in force and unchanged in any of our states, the judgments of the English courts, rendered before the period of the separation, are still of binding force, because they are in the direct line of authority, and because they must be considered as the highest and most conclusive evidence of what the com-

mon law was at that time, or perhaps as constituting in themselves not merely an exposition of the common law, but a part of it. But after 1776, the American states took the common law into their own hands and proceeded to mould it to their own purposes, both by legislative activity and by the course of judicial decisions. From that time on, so far as it was retained in force here, it became American law, not English law, and therefore it ceased to receive any increment from the judgments of the English courts. In some states, it was formally adopted by constitution or statute, in so far as it might be applicable to local needs and conditions. In others, it began to undergo a process of adaptation and modification by the rulings of the courts. In all, it has been very greatly changed. From that period, therefore, the authoritative exposition of the common law belonged to the American courts, and—since the truth is that the judicial exposition of the common law enters into it and becomes a part of it—the British courts no longer possessed the authority to add to, subtract from, or in any wise alter the common law, in so far as it constituted a part of the law of any one or all of the American states. Hence the rule that English decisions, made subsequent to the date of our separation from the British Empire, though they are entitled to great respect, and may properly be consulted and followed, when deemed satisfactory and convincing solutions of the legal questions involved, and in the absence of any direct and binding precedent here, still are not to be received as absolute or controlling authority in our courts.[1] As remarked by Denio, J., in one of the cases cited: "It is scarcely necessary to say that the English cases since the revolution are not regarded as authority in our courts. Upon disputed doctrines of the common law, they are entitled to respectful consideration; but where the question relates to the construction or effect of a written contract, they have no greater

[1] Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120; Koontz v. Nabb, 16 Md. 549; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Johnson v. Union Pac. Coal Co., 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

weight than may be due to the reasons given in their support." [2] In those of our present states where the common law was never in force, the basis of their jurisprudence being derived from the civil law, the English decisions upon the principles of the unwritten law are of course of very little importance. But still occasions may arise when a resort to them will be proper or even necessary. Thus in Louisiana, it is said that, when a question arises under the laws of another state, where the principles of the common law and the English system of equity prevail, and where the home courts may look to the English authorities for principles of decision, the courts of Louisiana should apply the same principles, as laid down in those decisions and in works of approved authority.[3]

Principle of Comity

An apparent exception to the foregoing rule is found in the occasional instances in which the English decisions are implicitly followed on the principle of comity, rather than of obligation. For example, in a case in a federal court, it appeared that a certain vessel, purporting to be owned by a British subject, was in reality the property of an American citizen, and was sailed under false colors and a fraudulent nationality. An agreement was made between a third party and the real owner of the vessel that the former should make a loan to the latter on his personal obligation, and that it should be secured by a mortgage on the vessel, to be executed by the fictitious owner. It was shown that, by the law of England, the use of the British flag and national character upon vessels not owned by British subjects, was unlawful. And it was accordingly held that it was the duty of the United States court, on the principles of comity, to apply the same rule and to adjudge the mortgage to be void.[4]

Weighing and Criticising English Authorities

Where the English decisions are consulted as persuasive evidence of the doctrines of the common law or the gen-

[2] Andrews v. Durant, 11 N. Y. 35, 44, 62 Am. Dec. 55.
[3] Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 563.
[4] The Acme, 2 Ben. 386, Fed. Cas. No. 27.

eral principles of jurisprudence, not as binding authorities to be followed whether right or wrong, their value is of course to be determined by those considerations which ordinarily affect the force of judicial precedents. Thus, it is said that even the decisions of the English courts prior to the American Revolution, in order to be accepted as binding evidence of the common law, must be clear and unequivocal.[5] And a decision by an English court, which was regarded by the English bench and bar as so unreasonable as to warrant a resort to legislation to eliminate it from the body of the English law, need not and should not be followed by the American courts.[6] At the same time, it is said that, in a case arising for the first time in an American state, the rule of the common law applicable to and which should govern that case will not be disregarded and a new rule created by the court, merely because the English judges have frequently regretted the adoption of the rule, as such a course would be a usurpation of power by the judiciary.[7] And the fact that a pertinent English case may have been overruled does not necessarily detract from its value as a precedent before an American court. The paradox apparently involved in this statement may be resolved by reflecting that as neither the original decision nor that which overruled it is of binding authority here, both decisions are equally open to the scrutiny and criticism of an American court, which may very well happen to be more impressed with the soundness and the justice of the first decision than of the later one, and more inclined to follow it, especially if the original decision has been approved by other courts in America, and the overruling decision repudiated.[8] And

[5] Ex parte Beville, 58 Fla. 170, 50 South. 685, 27 L. R. A. (N. S.) 273.

[6] North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435.

[7] Johnson v. Fall, 6 Cal. 359, 65 Am. Dec. 518.

[8] See, as an illustration, Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526, where it was said: "The rule which we think should govern in the case at bar is in keeping with the decision in Rolt v. Watson, 4 Bing. 273, a case overruled in England but not in America, and which, in our judgment com-

in general our courts are free to make their selection from among the English decisions, if they are to be consulted at all, and will give the preference to those which are seen to have been thoroughly argued, carefully considered by the court, and based upon sound principles of justice and good legal argument.[9]

Early Statutes Forbidding Citation of English Cases

In several of the states, at an early day, statutes were enacted prohibiting the citation of decisions of the English courts except such as were rendered before the separation from the mother country. Thus, in Kentucky, it was enacted in 1807 that "reports and books containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the 4th July, 1776, shall not be read nor considered as authority in any of the courts of this commonwealth." Yet, notwithstanding this statute, it was held by the courts that while the later English decisions had no authority as obligatory rules, yet they might be consulted and used so far as the reasoning and illustration of principles could enlighten the understanding and persuade the judgment.[10] There was a similar statute in Pennsylvania, and it was regarded in the same way by the supreme court of that state. In one of the cases it was said by Chief Justice Tilghman: "The cases in favor of it [the rule contended for by the prosecution] in the English courts, if any such there be, are since the American Revolution, 4th July, 1776, and therefore no authority here. But although our legislature has forbid the citing of such cases in our courts, yet it was never so unwise or so illiberal as to wish to restrain the judges from deriving useful information from the opinions of learned foreigners of all nations. I have therefore had the curiosity to run through the English decisions on questions similar to that before us, and

mends itself as an authoritative exposition of the law on the subject-matter adjudicated."

[9] See, for instance, Glenn v. Howard, 65 Md. 40, 3 Atl. 895.

[10] Leigh v. Everheart's Ex'r, 4 T. B. Mon. (Ky.) 379, 16 Am. Dec. 160. And see Hickman v. Boffman, Hardin (Ky.) 348; Marks v. Morris, 4 Hen. & M. (Va.) 463.

it appears to me" etc.[11] And indeed, during the early days of the Republic, it was absolutely necessary to turn to the decisions of the English judges for guidance in some of the departments of the law, such as equity jurisprudence, because practically all such cases were then cases of first impression in this country, and there was little or no domestic precedent to be followed.[12]

ADOPTED BRITISH STATUTES

127. Decisions of the superior courts of England are authoritative precedents upon the construction and interpretation of British statutes which have been adopted, in their identical form or in substantially the same language, by the legislature of an American state or by Congress, provided that such decisions were rendered before 1776, in the case of a statute which was then in force in England, or, in the case of a later statute, prior to the date of its adoption in America.

In regard to that part of the statutory law of England which was in force at the time of the American Revolution, and which was adopted in the American states, or constituted a part of the original law which they assumed to live under after the War of Independence, the decisions of the English courts upon the construction of such statutes, made before that event, are direct and binding authorities. But for the reasons stated in the preceding section, the judgments of the English courts interpreting such statutes, when given after the separation of the two countries, are not to be received as absolute or imperative authority in our courts, except in so far as they show what was the course of judicial decisions prior to that event.[13]

[11] Lewer v. Commonwealth, 15 Serg. & R. (Pa.) 93.

[12] See this point expounded by Chancellor Kent in the case of Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 262, 8 Am. Dec. 492.

[13] Mayor, etc., of Baltimore v. Williams, 6 Md. 235.

This was fully brought out in a decision of the Supreme Court of the United States, in which it was said: "The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of these states. By adopting them, they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves and forming an integral part of them. But however we may respect subsequent decisions, —and certainly they are entitled to great respect,—we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them." [14]

In regard to British statutes of a later date, when such a law is copied or adopted, wholly or in part, by Congress or a state legislature, after having received a settled construction by the decisions of the English courts, the legislature so enacting it is presumed to be cognizant of such construction, to accept or acquiesce in it, to understand the statute in the light of it, and to intend that it shall be interpreted in the same way by our own courts. Hence the English decisions which have been concerned with the interpretation of the statute (up to the time of its adoption in this country, but not afterwards) are not merely persuasive evidence of its meaning, but have entered into and become a part of the law and are therefore direct and binding precedents.[15] Thus, it is said by the Supreme

[14] Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120.

[15] Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327; Kirkpatrick v. Gibson, 2 Brock. 388, Fed. Cas. No. 7,848; Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 571; Meakings v. Ochiltree, 5 Port. (Ala.) 395; Tyler v. Tyler, 19 Ill. 151;

Court of the United States: "It is a received canon of construction, acquiesced in by this court, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." [16] So by the Supreme Court of Pennsylvania: "The common-law rule prevailed in England until the passage of the Wills Act of 1 Vict. c. 26 (1838), the twenty-fourth section of which is identical in form with the first section of our statute of 1879. The several adjudications which had been made upon the former in the courts of England are important, therefore, in the construction which we should put upon the latter; these adjudications may indeed be supposed to have been in the mind of the legislature when this section of the English statute was incorporated into ours." [17] So again, in the third section of the Interstate Commerce Act, Congress adopted the language of the English Traffic Act of 1854, in respect to "undue preferences." Hence it is to be presumed that it was intended also to adopt the construction given to these words by the English courts, and they are so construed, following the English cases.[18] And further, where a statutory provision introduces no new principle, but is merely affirmative of the common law, the decisions upon the common law are applicable as precedents after the enactment of the statute.[19]

McKinnon v. McLean, 19 N. C. 79; Lavender v. Rosenheim, 110 Md. 150, 72 Atl. 669, 132 Am. St. Rep. 420; Jarvis v. Hitch, 161 Ind. 217, 67 N. E. 1057; Norfolk & W. R. Co. v. Old Dominion Baggage Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; Adams v. Field, 21 Vt. 256; Marqueze v. Caldwell, 48 Miss. 23.

[16] McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269, citing Pennock v. Dialogue, 2 Pet. 1, 18, 7 L. Ed. 327.

[17] Appeal of Fidelity Ins., Trust & Safe Deposit Co., 108 Pa. 492, 1 Atl. 233.

[18] Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269.

[19] Wren v. Dooley, 97 Ill. App. 88.

But it is necessary to the application of this rule that there should be either a substantial identity or at least a very close similarity between the language of the original statute and that which is alleged to have been copied from it. If they differ in important details, so that it cannot be said with certainty that the interpretation of the original statute would have been the same if the added or changed provisions had been before the court, then the English decisions are not of authority.[20] And in fact, it is also a well-known rule of construction that if a legislature, taking a statute from elsewhere as a model, proceeds to change or vary its language in detail, it is presumed to have done so with the purpose of avoiding the construction already put upon it, or with the intention that it should be interpreted in a different manner; for change of language implies a purpose to change the meaning.[21]

ENGLISH EQUITY CASES

128. The decisions of the English courts in equity cases, while not absolutely binding on American courts, are received with a peculiar respect and accorded a very high degree of authority.

The elaborate and complex system of equity jurisprudence, as it stands now, owes very little if anything to the aid of legislative enactments. Practically in its entirety it is the product, slowly evolved, of successive decisions of the courts. Its foundations were laid deep and strong, its rules and maxims gradually worked out, and its principles applied to a multiplicity of cases, by the chancellors of England, and their judgments form the great fountainhead of modern equity law and practice. To a much greater extent than in any other department of the law, these adjudications constitute the law itself, instead of being

[20] Miller v. McNeill, 35 Pa. 217, 78 Am. Dec. 333.

[21] Copper Queen Consol. Min. Co. v. Territorial Board of Equalization, 9 Ariz. 383, 84 Pac. 511 (affirmed 206 U. S. 474, 27 Sup. Ct. 695, 51 L. Ed. 1143); Kirman v. Powning, 25 Nev. 378, 61 Pac. 1090.

merely evidence of it. Hence the English equity decisions are very constantly and very properly referred to by American courts having equitable jurisdiction, for their information and guidance. To take a single example, in that branch of equity jurisprudence which is concerned with trusts, their creation and incidents, great reliance is placed by most American courts upon the determinations of the English chancellors, both ancient and modern, as they furnish a multitude of well-considered adjudications dealing with this subject.[22] This is true even in those states whose jurisprudence does not rest upon the basis of the common law. Thus, in Louisiana, it is said that, while the arbitrary rules of a foreign system of jurisprudence (meaning the English common law) cannot be invoked, yet on the great principles of equity the decisions of that country may be consulted, at least in the absence of a local statutory rule or binding precedent.[23] It is true that, at the present day, the American cases have covered almost the entire field of equity, so far as contemporary needs and circumstances have required its development. And naturally, a court which is cited to a previous decision of its own and finds it applicable and decisive of the question before it, will feel no need of recurring to the English decisions for a re-examination of the matter in hand. But as to all questions of first impression, and such as are not fully or precisely covered by their own former decisions, the practice of the American courts in general is to turn to the English equity cases, and, while not conceding to them an absolutely controlling effect, to regard them with higher consideration than is accorded to the judgments of the courts of any sister state. While this is generally the case, it is especially true of the courts of a few of the states, among which may be mentioned Maryland, Massachusetts, and New Jersey. As to the last-named state, however, it should be remarked that very early ordinances and statutes ordained that its court of chancery should hear and determine all causes and suits which come before it as near

[22] See, for example, Hemenway v. Hemenway, 134 Mass. 446.
[23] Miller v. Holstein, 16 La. 389.

as may be according to the usage and custom of the high court of chancery in the Kingdom of England; so that, at least so far as regards matters of equity practice and procedure, in the absence of any applicable statute or independently developed practice, that court will follow the usages and procedure of the English court of chancery, as a matter of obligation.[24]

In respect to the authority of the modern English decisions in equity, and the propriety of consulting them, we may with advantage quote the following language of Chancellor Kent in an early case in New York: "We are told that no English authorities since 1776 are of binding authority, and that our courts are not to vary with the opinions or perhaps caprice of English tribunals. It is true that we are not to be bound by their errors, nor do we feel subdued by their authority, but we can listen with instruction to their illustration and application of the principles of the science. Far from me and from my friends be such frigid philosophy, or such unreasonable pride, as may turn us with indifference or disdain from the decisions and the wisdom of other nations. It is to be recollected that we have very little domestic precedent in matters of equity to guide us. [This was written in 1817.] A question of this kind has probably never arisen before in our own courts. We must resort for information to the courts of that nation from which our jurisprudence as well as the best of our institutions are derived; and we can do it with uncommon advantage in matters of equity." [25]

[24] Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; Southern Nat. Bank v. Darling, 49 N. J. Eq. 398, 23 Atl. 475; West v. Paige, 9 N. J. Eq. 203; Morris v. Taylor, 23 N. J. Eq. 131.

[25] Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 262, 8 Am. Dec. 492.

ENGLISH ECCLESIASTICAL CASES

129. On matters within their peculiar jurisdiction, such as probate and divorce proceedings, the decisions of the English ecclesiastical courts, while not of controlling authority, are of great value and receive great consideration; but it is otherwise as to their rulings on questions of general law coming incidentally before them.

As to matters relating to the probate of wills and the administration of estates, and as to the general law governing proceedings of nullity or for divorce or separation, the body of law worked out by the judges who presided over the ecclesiastical courts of England, and afterwards over that division of the High Court to which their jurisdiction was transferred, has been a veritable store-house of information and instruction for the judges of American courts having similar questions before them. These English judges, as a rule, have been highly trained specialists, and the law administered by them was largely founded on the civil and canon law, as distinguished from the common law. For these reasons, their decisions have always been received with peculiar deference and respect, as may easily be seen by any one who will take the trouble to examine the leading American cases on the subject of probate or divorce law or the standard elementary treatises on those subjects. And it may be stated as a general rule that the settled principles and practice of the English ecclesiastical courts should be regarded as precedents for the governance of courts of the American states, when exercising, under statutes, any part of the jurisdiction peculiar and appropriate to those courts.[26] Thus, it is said that, although the ecclesiastical law of England is no part of the common law adopted in New York, yet the courts of that state, in determining the effect of a state of facts under a

[26] Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460. And see In re Hock's Will (Sur.) 129 N. Y. Supp. 196.

statute relating to actions for separation, may properly consider the effect given to such facts by the ecclesiastical court which had jurisdiction of the same subject.[27]

But, perhaps for the very reason that the ecclesiastical judges were mostly canonists and civilians, it is considered that their judgments upon questions of general law coming incidentally before them,—such as questions growing out of the common law or out of the general law of property, contracts, torts, or personal relations,—are not entitled to the same high degree of deference and respect. In Georgia, for example, it is declared from the bench that the courts of that state will be governed by the adjudications of the courts of common law and chancery in England, upon questions of property, in preference to the decisions of the ecclesiastical courts.[28]

VALUE OF ENGLISH PRECEDENTS IN NOVEL AND UNSETTLED CASES

130. In cases of first impression, where an American court is bound by no former adjudication of its own, and where there is either an entire want of well-considered American decisions on the point or an irreconcilable conflict in the decisions of the various states, it will consult the decisions of the superior courts of Great Britain, not as conclusive, but as highly persuasive evidence of the right rule of law. And it may be stated as a general rule that an American state court, in such a case, will be more strongly influenced by the decisions of the English courts than by the adjudications of any other American court except the Supreme Court of the United States, and that the latter court, in similar cases, will regard the English decisions as next in authority after its own former rulings.

[27] Hawkins v. Hawkins, 193 N. Y. 409, 86 N. E. 468, 19 L. R. A. (N. S.) 468, 127 Am. St. Rep. 979.

[28] Chapman v. Gray, 8 Ga. 341.

It may not be possible to find an explicit statement of the foregoing rule in any reported decision of our courts. Yet even a cursory examination of the body of American case-law will show its constant application in practice. It can probably be best illustrated by a number of examples, selected almost at random from the reports, and which might be multiplied indefinitely if it were profitable to do so. To begin with the Supreme Court of the United States, in holding that a photograph may be the subject of copyright, that court said: "The question here presented is one of first impression under our constitution, but an instructive case of the same class is that of Nottage v. Jackson, 11 Q. B. Div. 627," which case was approved and followed.[29] So by the Court of Appeals of Maryland: "In the absence of any decisions in Maryland, we are constrained to adopt the exposition of principles by these eminent English judges."[30] And again, the same court, in holding that the estate of a husband, in the hands of an administrator, is liable for the counsel fees of his wife in a suit for divorce which was pending when he died, said: "The law upon this subject as settled in several of the American states is at variance with that of England, and according to the decisions of the courts of those states, this action could not be maintained. But the principle of the English decisions would seem to be more in consonance with our own practice, and we shall therefore follow them."[31] So also, in the New York Court of Appeals it was said: "The question does not seem ever before to have arisen in this country, and we are left at liberty to examine the English rule, and to follow it or not, as we approve or disapprove its logic and its consequences."[32] In a case in Illinois, the question was whether mandamus would lie to compel the acceptance of a municipal office by one who, possessing the requisite qualifications, had been duly elected or appointed

[29] Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349.

[30] Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

[31] McCurley v. Stockbridge, 62 Md. 422, 50 Am. Rep. 229.

[32] Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. 557. 20 L. R. A. 335, 33 Am. St. Rep. 751.

thereto. Neither counsel nor the court could find any American case in which this question had been decided. But as the court found that the English cases abundantly supported the doctrine that there is a legal duty to accept an office when duly elected or appointed, in a public or municipal corporation, at common law, and that mandamus is an appropriate remedy in case of refusal, the question was decided in the affirmative.[33] So again, in a case in Maryland in 1883, the question involved being one of first impression in that state, the court placed its chief reliance on an English decision, which was not even rendered on appeal, but was ruled at the trial of the action, and of which the Maryland court said: "It is true this was simply a decision at a nisi prius trial, but though made as long ago as 1836, it does not appear to have been overruled or questioned by any subsequent English authority. On the contrary, the very language of the judge has been cited and adopted by the most eminent English text-writers on evidence and wills."[34] And again, in the same court: "In the absence of any express adjudication in this state, the majority of the court approve the English practice."[35] In Massachusetts, there was a case involving the construction of a will, and the question whether under its terms grandchildren of the testator should stand in the place of their parents. The court said: "This question is one of great difficulty, but we are inclined to the view of the appellees, for the reasons given in Gowling v. Thompson, L. R. 11 Eq. 366," and in addition to that case, the court cited and placed its reliance on eight other English cases and one from Kentucky and one from Ohio.[36] The general tendency is also shown by the following extract from an opinion of the court in New Jersey: "The rule has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. * * * In our opinion, the rule established in England by the judg-

[33] People ex rel. German Ins. Co. v. Williams, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 Am. St. Rep. 514.

[34] Hoppe v. Byers, 60 Md. 381.

[35] United Lines Tel. Co. v. Stevens, 67 Md. 156, 8 Atl. 908.

[36] Huntress v. Place, 137 Mass. 409.

ment of the House of Lords * * * is one which, in ordinary contracts of this nature, will work out results most conformable to reason and justice." [87] So also, in another state: "The views thus expressed have the apparent support of most elementary writers and seem to be in conformity with the doctrine prevailing in England. The contrary doctrine, if not indefensible, is founded on reasons exceedingly artificial." [88]

ENGLISH DECISIONS LOCALLY INAPPLICABLE

131. Independently of any statutory enactments, rules and principles of law established by the decisions of the English courts will not be adopted or followed in this country, when deemed inapplicable or inappropriate to the wants or the habits and usages of our people, as determined by climatic, geographic, industrial, social, or other conditions.

The reasons which underlie this rule are self-evident. The philosophy of it has been thus explained by the court in Ohio: "Whenever a question of law has been settled in England, the courts in this country are in the habit of adhering to such decision. It is undoubtedly correct that such should as a general rule be the case. But to adhere blindly to English decisions when no good reason can be assigned for them, or when no other reason can be assigned for them than that it has been thus decided, to do this without inquiring what influenced the courts to make such decisions, to do it without inquiring whether the same reasons exist in this country as in that, would be foolish in the extreme." The question in this case was whether the county or the sheriff was liable for the escape of a person imprisoned for debt. The court held that the county was liable, contrary to the English law, by which the liability would fall on the sheriff, the reason of the decision being

[87] Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159.

[88] Hannaman v. Karrick, 9 Utah, 236, 33 Pac. 1039.

that the powers and duties of sheriffs were totally different in the two countries.[39] So it has been remarked by another judge in the same court: "I shall always give a preference to the American over the English cases, other things being equal; for I do not believe that a judge is bound to deal only with abstract principles of law. It is his duty also to understand the habits and condition of the people among whom he lives, and this he will best be able to do by studying the adjudications which have been made in his own country." [40]

A conspicuous example of the application of this rule is seen in the rejection by our courts of the English doctrine that "navigable waters" are those only in which the tide ebbs and flows, and the substitution of the American doctrine, better adapted to the condition and use of our great inland waterways and lakes, that a stream or body of water which is navigable in fact is navigable in law.[41] Another notable example is the repudiation of the common-law doctrine of riparian rights in some of our western states, where the arid nature of the country and the imperative need of water for agriculture, mining, and other industries would make the rule of the equal and common use of a stream by all riparian owners (or by all who have access to it by license of the government to go upon the public domain) entirely inappropriate, and where the doctrine of "prior appropriation" has been established instead.[42] Another illustration, hardly less striking, is seen in the statement that the English doctrine of markets overt, which controls and interferes with the application of the common law, has never been recognized in any of the United States, nor received any judicial sanction here.[43] It

[39] Brown County Com'rs v. Butt, 2 Ohio, 348.

[40] Scott v. Fields, 7 Ohio, 90, pt. 2, per Grimke, J.

[41] The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. Ed. 1058; Browne v. Scofield, 8 Barb. (N. Y.) 239.

[42] Atchison v. Peterson, 20 Wall. 510, 22 L. Ed. 414; Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364.

[43] Ventress v. Smith, 10 Pet. 175, 9 L. Ed. 382; National Bank of Commerce of Kansas City v. Morris, 114 Mo. 255, 21 S. W. 511, 19

was the rule of the common law that the owner of animals must keep them within fences, and that any entry by them upon the land of another, without his consent, though his land was not enclosed, was a trespass. This rule may still be in force in some of our states. But "in several of the states, and by the Supreme Court of the United States, it has been held that this rule of the common law is so ill adapted to our condition, and is so in conflict with the practice of our people, indulged for time immemorial, that it should not be considered as adopted by us, even in the absence of statutory provisions abrogating it." [44] Again, "the common law of England was very strict in regard to waste. Its rigor has been much relaxed here, especially in the matter of timber. This was to be expected in a new country, where land was far more valuable without timber than with it. In Hastings v. Crunckleton, 3 Yeates (Pa.) 261, it was held that a tenant in dower may clear woodland assigned to her in dower, provided she does not exceed a just proportion of the whole tract. It was said by the court in that case: 'There was a material difference between the local circumstances of this state and Great Britain. It would be an outrage on common sense to suppose that what would be deemed waste in England could receive that application here. Lands with us in general are enhanced by being cleared.'" [45] On somewhat analogous principles, and by reason of certain well-known physiological facts, depending on differences of climate and racial conditions, the courts of Louisiana, and perhaps of some other southern states, have repudiated the common-law rule that a boy under the age of fourteen years could not commit the crime of rape.[46] Again, the English doctrine of "identity," which defeats the right of a passenger

L. R. A. 463, 35 Am. St. Rep. 754; Hosack v. Weaver, 1 Yeates (Pa.) 478.

[44] Clarendon Land, Investment & Agency Co. v. McClelland (Tex. Civ. App.) 218 S. W. 170, citing Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; Davis v. Davis, 70 Tex. 123, 7 S. W. 826.

[45] Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308.

[46] State v. Jones, 41 La. Ann. 784, 6 South. 638.

in a public vehicle, or of one riding in a private conveyance, to recover for injuries caused by the negligence of another, when the driver of the conveyance in which he is has contributed to the injury, is not followed in this country. "The weight of authority in this country is opposed to it, and the reasons which have been assigned for the rule, and upon which it must be deemed to rest, cannot, we think, be sustained." [47] An instructive case illustrating this general rule is found in Illinois, where the question was whether a court of chancery had power to authorize the sale of a minor's lands and the reinvestment of the proceeds. Said the Supreme Court of that state: "Decisions are to be found in the English reports which hold that courts of equity have no power, by virtue of their general jurisdiction over minors, to order the sale of minors' real estate for the purpose of education, maintenance, or investment, and that is probably the prevailing doctrine in England. The same rule seems to have been adopted by some of the courts of this country. The principal reason for denying this jurisdiction in England appears to be that, by changing the nature of minors' estate from real to personal, or from personal to real, the rights of third persons who will be entitled in case of the minor's death will be materially affected, as in that country real and personal property descend in different channels. That reason, it is very manifest, does not obtain in this country, as here both species of property go by descent or distribution to the same persons. The interference of the court, therefore, in sanctioning a conversion of the property from real to personal, or from personal to real, does not materially affect the rights of the persons who, in case of the minor's death, may become entitled to succeed to his estate." [48] In some of our states, also, the courts have declined to follow the English decisions defining the relative rights of master and servant, and the responsibility of the former for injuries

[47] Follman v. City of Mankato, 35 Minn. 522, 29 N. W. 317, 59 Am. Rep. 340.

[48] Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

received by the latter in the course of his employment; and this, quite independently of the employers' liability acts.[49]

DECISIONS OF OTHER FOREIGN COUNTRIES

132. Where the rights of parties to an action depend upon, or must be governed by, the law of a foreign country, decisions of the superior courts of that country will generally be accepted as conclusive upon the interpretation of its written law or as expositions of its jurisprudence. But upon questions of general law, not local in their character, adjudications from foreign countries other than Great Britain, and especially those whose jurisprudence is based upon the Roman law, are regarded as of very slight value as precedents for American courts.

Decisions of the courts of foreign countries, such as France, Germany, or Italy, are not infrequently received and referred to in our courts as evidence of the law of such countries, where the rights of the parties to an action may depend thereon, or must be governed by the application of such foreign law. This is seen, for instance, in matters within the field of private international law, such as contracts, bankruptcy and insolvency, marriage and marital relations and rights, and the descent and distribution of property. So also on the question whether the judgment of an American court is accepted as final and conclusive in the particular foreign country, or is regarded as open to re-examination on the merits, with a view to applying a rule of reciprocity. In any matter of this kind, the law of a foreign country must be proved as matter of fact. If it is unwritten or customary law, the judgments of the courts are the best and even the sole evidence of it. If it is statutory law, the explanation of any obscure or

[49] See Johnson v. Union Pac. Coal Co., 28 Utah, 46, 76 Pac. 1089, 76 L. R. A. 506.

ambiguous provisions or of such as are unfamiliar to our juristic ideas will naturally be sought in the judgments of the courts. From the application of these principles we obtain the somewhat curious result that a decision of an American court, finding and stating the law of a foreign country on a given point, is not binding on different parties in another action involving the same question; in other words, it is not a precedent binding even on the court which made it; for it is necessary in each case to prove the foreign law as matter of fact, and to do this we must recur to the original sources, that is, the written laws and the judicial decisions of that country.[50]

In dealing with judicial decisions from those countries whose jurisprudence is founded on the Roman or civil law, we encounter another paradox. In those countries, the doctrine of precedents does not obtain in its full integrity, as with us. Very little if any regard is paid to the maxim "stare decisis," which we consider so fundamental a part of our jurisprudence. In some, the judgments of the highest courts are not even regularly or officially reported. In all, the courts hold themselves perfectly free to determine each case before them as if it were one of first impression, and they consult the decisions of their predecessors only for suggestion or advice, not with any view to being bound by them.[51] Hence an American court may feel constrained to accept a decision of the highest court of France or Germany as conclusive evidence of the law of the country, although the same decision, at home, has no imperative force as a precedent. It is only in the absence of such adjudications, or when none are exhibited to it, that a court in this country is free to construe the law of a foreign country according to its own notions. Thus, it is said the fact that the courts of Mexico are not governed by precedents and that they have no reports or records of adjudged cases, is no obstacle to the maintenance of an action in a United States court to enforce a right given by the statutory law of Mexico; for in the absence of such

[50] Kessler v. Armstrong Cork Co., 158 Fed. 744, 85 C. C. A. 642.
[51] See, supra, pp. 21–24.

reports, the court trying the case will put its own interpretation upon the laws of Mexico.[52]

To proceed to specific illustrations of the foregoing rules, the courts of this country, both national and state, have held themselves imperatively bound to accept and follow the construction placed upon the statutory law of Hawaii by the courts of that kingdom, before its annexation to the United States, in such matters as those relating to the marital relation, the legitimacy of children, the guardianship of insane persons, and jurisdiction in divorce proceedings.[53] So in a case in New Jersey, where the question was upon the distribution of the estate of an American who had married in France and resided there for some time before his death, it was said: "It is clearly shown, not only by the testimony of the French lawyers who were witnesses in this case, but also by the French decisions, that it is the law of that country that the marriage of a foreigner in France, without any contract, followed by a conjugal domicile in France, will subject the property of the married persons to the community law."[54] So, in a case in Louisiana, where the question was upon the construction of a statute of that state, which was identical in terms with a certain article of the French code, the court, in addition to the opinions of jurists, cited not only a decision of the Cour de Cassation (the court of last resort in France); but also the decisions of various French provincial courts.[55] Again, in a case in a federal court, on the question whether recovery on a promissory note, made and payable at Toronto, could be resisted on the ground that it was given for counsel fees, for which an action could not be maintained under the English law, it was said by the court: "It is admitted that the law of the Province of Ontario governs the contract. * * * It appears to have been decided

[52] Evey v. Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

[53] Kealoha v. Castle, 210 U. S. 149, 28 Sup. Ct. 684, 52 L. Ed. 998; McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20.

[54] Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17.

[55] Succession of Le Blanc, 37 La. Ann. 546.

by the Court of Queen's Bench in that Province, contrary to the law of England, that counsel can sue for fees. * * * I shall accept this decision of the court as settling the case upon the point controverted." [56]

But when we turn to questions of general law, not local or statutory, it is manifest that the decisions of the courts of foreign countries, other than England, can ordinarily have very little value as precedents for the determinations of our courts. This is chiefly in consequence of the radical differences between our whole system of jurisprudence and theirs, which neither rest upon the same foundation nor have been developed in the same manner. Though such decisions are sometimes cited in our courts, they are not often allowed much influence, and are never, it is believed, preferred to pertinent American or English cases. Thus, in a case in a federal court, on the question whether a label of a particular color merely could be the subject of a trade-mark, it was said: "Whatever view may be taken by the French courts in the cases referred to by the learned counsel for complainants, we know of no American or English authority which goes to this extent." [57] So, in a case in Maryland, much reliance was placed by one of the parties to the action on a decision of the appellate court of Lower Canada, which had been approved as correct by an eminent text-writer on the subject to which it related. Aside from some criticisms on the imperfect report of the case and the difficulty of understanding exactly what it purported to decide, the Maryland court remarked: "But suppose the case has all the effect claimed for it by the appellee. * * * We could not agree that it should overrule the long list of authorities to the contrary." [58] But of course there may be circumstances, either intrinsic in the decision itself, or growing out of the facts of the case, which would entitle the foreign adjudication to a much higher degree of respect. Thus, the Supreme Court of Arkansas, on one

[56] Mowat v. Brown (C. C.) 19 Fed. 87.

[57] Fleischmann v. Starkey (C. C.) 25 Fed. 127.

[58] Providence Washington Ins. Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314.

occasion, referred with approbation to a decision of the Supreme Court of Canada, and stated that the opinion in the case cited was one that "reviews the authorities, English and American, and sustains its conclusions by reasoning that we deem unanswerable." [59] So a federal court, in a patent case, observed that a decision by the courts of Germany, to the effect that the discovery of a certain process involved the exercise of a patentable invention, while not binding on the courts of this country, was still entitled to weight as the opinion of a body of trained experts in the country of the inventor, where the particular art was best understood.[60]

It is also to be remarked that the jurisprudence of the state of Louisiana is very extensively modeled upon, or similar to, that of France. And hence, in this one state, the decisions of the French courts are very frequently referred to for instruction and guidance, and are listened to with peculiar respect, not only in cases involving the construction of statutes of Louisiana which have been substantially transcribed from the civil code of France, but also on general questions of law.[61]

[59] St. Louis, I. M. & S. Ry. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472.

[60] Badische Anilin & Soda Fabrik v. Kalle (C. C.) 94 Fed. 163.

[61] See, for example, Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; Bernard v. Whitney Nat. Bank, 43 La. Ann. 50, 8 South. 702, 12 L. R. A. 302 (dissenting opinion of Fenner, J.); Pickens v. Gillam, 43 La. Ann. 350, 8 South. 928; Mullins v. Blaise, 37 La. Ann. 92; Succession of Le Blanc, 37 La. Ann. 546.

CHAPTER XII

FEDERAL COURTS FOLLOWING DECISIONS OF STATE COURTS; IN GENERAL

133. The General Rule.
134. Varying Decisions in Different States.
135. What Decisions Controlling.
136. Same; Fictitious or Test Cases.
137. Same; Rulings of Intermediate and Inferior Courts.
138–139. Absence of Decisions by State Court; Federal Court Rendering First Decision.
140–142. Prior Federal Decision and Subsequent Contrary State Decision.
143. Inconsistent or Fluctuating Decisions.
144–145. Same; Vested Rights and Contracts.
146. Same; Validity of Municipal Bonds.
147–148. Conflicting State and Federal Decisions; Duty of Inferior Federal Courts.

THE GENERAL RULE

133. The courts of the United States are ordinarily bound to follow the precedents established by the decisions of the courts of a state in respect to the construction of its constitution and laws, and where such decisions have become a settled rule of property, and also upon questions of local law or custom, no federal question being involved.

It was pointed out in an earlier chapter of this work that the courts of the United States, and particularly the Supreme Court, are the final and authoritative interpreters of the constitution and laws of the Union, and that their decisions upon federal questions furnish imperative rules for the determination of like questions by the courts of the various states, constituting not merely persuasive evidence of the meaning and application of federal law, but controlling precedents.[1] The converse of this rule is equally true.

[1] See, supra, Chapter IX, p. 336.

That is, decisions of the highest courts of the states, which are concerned solely with the law of the particular state, whether the question relates to the interpretation of the state constitution or a state statute, or the validity of the latter as tested by the former, or to a settled rule of property in the state, or arising out of some peculiarity of local law or custom, are precedents for the decision of similar questions in the federal courts, which are of controlling authority, and which should, and ordinarily will, be followed by those courts without an independent investigation of the principles involved.[2]

The ground of this obligation is not entirely clear. It has generally been supposed to rest upon that provision of the Revised Statutes which declares that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."[3] But the Supreme Court of the United States has pointedly declared that judicial decisions, though rendered by the highest court of a state, are not "laws" of the state, within the meaning of this statute.[4] But since such decisions proceed from the only tribunal having the final voice in the settlement of all questions of local law, whose

[2] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Williams v. Gibbs, 17 How. 239, 15 L. Ed. 135; Goodling v. Oliver, 17 How. 274, 15 L. Ed. 148; Townsend v. Todd, 91 U. S. 452, 23 L. Ed. 413.

[3] Rev. St. U. S. § 721 (U. S. Comp. St. 1901, p. 581). See Golden v. Prince, 3 Wash. C. C. 313, Fed. Cas. No. 5,509; Meade v. Beale, Taney, 339, Fed. Cas. No. 9,371; Loring v. Marsh, 2 Cliff. 311, Fed. Cas. No. 8,514. Note that this provision only applies to "trials at common law." Where the question is one of general equity jurisprudence, the national courts, having an equity system of their own, are not bound to follow the decisions of the state courts. Neves v. Scott, 13 How. 268, 14 L. Ed. 140. Neither has this statute any application to the trial of criminal offenses against the United States. United States v. Central Vermont Ry. Co. (C. C.) 157 Fed. 291. Nor to a question of international law or comity. Evey v. Mexican Cent. Ry. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

[4] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

pronouncements must be accepted and obeyed not only by the parties before it and by the courts inferior and subordinate to it, but also by the people of the state generally, they are the highest and best evidence of what the law is. This is conceded by the United States courts, as where it is said: "Since the ordinary administration of law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is." [5] Still, the function of evidence is to persuade or convince, not to command; and the word "authoritative" does not mean "conclusive," as used in this connection by the Supreme Court of the United States. That court has sometimes declared that a decision of the highest court of a state would not be respected or followed by it where it was not satisfactory to the minds of the judges of the federal court.[6] And in other cases, while admitting that "in all cases where there is a settled construction of the law of a state by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry," it has yet carved out numerous exceptions and stated various instances where it would feel perfectly free to exercise an independent judgment, even upon a question of local law, notwithstanding the adjudications of the state courts.[7] Again, it should be remembered that, while the courts of the United States are not foreign tribunals in their relations to the state courts, yet they belong to a different system and are tribunals

[5] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. And see Townsend v. Todd, 91 U. S. 452, 23 L. Ed. 413; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Sims' Lessee v. Irvine, 3 Dall. 425, 1 L. Ed. 665; Walker v. Marks, 17 Wall. 648, 21 L. Ed. 744.

[6] Pine Grove Tp. v. Talcott, 19 Wall. 666, 22 L. Ed. 227.

[7] See Pease v. Peck, 18 How. 595, 15 L. Ed. 518.

of a different sovereignty,[8] and their judgments and decisions are not reviewable by the courts of the state. Hence, being in no sense inferior or subordinate to the highest court of the state wherein they sit, they are not under that kind of legal obligation to defer to and follow its decisions which rests upon any subordinate tribunal with reference to the rulings of the court having revisory jurisdiction over it.

It appears, therefore, that the rule which requires the United States courts to accept and follow the decisions of the state courts upon questions of local or statutory law cannot be rested upon any firmer basis than that of comity. It is not a statutory obligation, neither it it traceable to any relation between the courts of the two systems. Yet it is a rule which is sanctioned no less by the universal habit of the federal courts than by considerations of good sense and judicial propriety. As the courts of the federal system reserve to themselves the final authority for the determination of all questions arising under the constitution or laws of the Union, so they naturally concede to the court of last resort in any state the right to decide finally and conclusively upon any question arising under its laws or growing out of its local practice or customs.

Again, it is reasonable to suppose that the judges who are daily concerned with the administration of the particular law of the state are familiar with its meaning and its application, and that their decisions upon questions arising under it are eminently likely to be right. Therefore when the jurisdiction of a federal court is invoked merely because of the diverse citizenship of the parties to the action, and it is called upon to interpret and apply, not the law of the United States, but the law of the state where it sits, it naturally yields the greatest deference to the opinions of the highest court of that state, and ordinarily, and with the utmost propriety, declines to enter upon an independent discussion of any problem of local law which has been settled, for the courts of the state, by the adjudication of that tribunal. Moreover, it is always a reproach to justice and

[8] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

a testimony against the certainty of the law when the same legal question is resolved in one way by the courts of a state and in another way by the federal courts within its borders. And to avoid this indecent conflict, the federal courts will always strongly incline to a concurrence of opinion with the local courts, where no federal question is involved, will defer to their authority, even where not absolutely bound to accept their decisions, and will not introduce a contrariant rule or principle unless it be for the most cogent and compelling reasons.[9]

It is also necessary here to distinguish carefully between the principle of res judicata and that of stare decisis. Under the constitutional provision that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" and the act of Congress extending it to the federal courts, they are required to give to a judgment rendered by a state court of competent jurisdiction the same faith and credit which it would be entitled to receive in the courts of the state where rendered. For example, the decision of the highest court of a state as to the right of one railroad company to cross the lands of another railroad company within the state, is conclusive, and cannot be reviewed by a United States circuit court in a subsequent suit between the same parties and involving the same subject-matter, though a federal question is involved.[10] But the principle of res judicata, as thus extended and applied by the federal constitution and laws, applies only to the effect of a judgment as evidence or as a cause of action, not as a precedent. A federal court may fully obey the constitution and laws in giving full faith and credit to the judgment of a state court, while entirely disapproving the principle of law on which it was decided and refusing to follow it as a precedent for

[9] Thomas v. Scotland County, 3 Dill. 7, Fed. Cas. No. 13,909.

[10] Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co. (C. C.) 51 Fed. 858. And see, generally, 2 Black, Judgm. § 938c; Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677); Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

the determination of other causes, involving the same question, but between other parties or on a different subject-matter.[11]

The position of the territories is somewhat different from that of the states, and on account of the revisory jurisdiction of the highest federal courts, the decisions of their tribunals do not possess quite the same authority as those of the courts of last resort in the states. Still it is said that a decision of the local courts in a territory, upon the construction of a territorial statute, is entitled to great weight, if not controlling authority, in the courts of the United States, even the Supreme Court.[12] A somewhat different question, and one not yet settled, arises when a federal court is asked to adopt and follow a decision of a state supreme court, interpreting a statute which was not enacted by the legislature of the state, but by the legislative authority of the territory out of which the state was erected. It seems to be thoroughly in accord with the legal analogies of the case that the federal court should accept the rulings of the state court. In the only case in which, as yet, this question appears to have arisen, this course was pursued, but not so much on the ground of legal obligation as because the decision of the state court commended itself to the reason and judgment of the federal court.[13]

[11] Fuller v. Hamilton County (C. C.) 53 Fed. 411.

[12] Lewis v. Herrera, 208 U. S. 309, 28 Sup. Ct. 412, 52 L. Ed. 506.

[13] Capitol Bank of St. Paul, Minn., v. School District No. 26, Barnes County, N. D., 63 Fed. 938, 11 C. C. A. 514. In this case it was said: "It is strenuously urged that this court is not bound by the decision of the state supreme court construing the act aforesaid, because it was a territorial statute, and not a law enacted by the legislature of the state of North Dakota subsequent to its admission into the Union. We shall not stop to inquire at the present time whether the decision of the state court construing a law of the territory out of which the state had been carved should be given the same force and effect as a decision of that court construing an act of the legislature of the state. We conceive that the present case does not require us to express an opinion on that novel proposition. It is sufficient to say at this time that it is highly important to the due administration of justice that courts exer-

VARYING DECISIONS IN DIFFERENT STATES

134. Where the same question of local statutory or common law has been decided differently by the courts of last resort in different states, the Supreme Court of the United States, in adjudicating cases before it, will decide each in accordance with the settled course of decisions in the state where the action originated, notwithstanding that it may, before or afterwards, give an entirely different judgment upon the same question in a case coming before it from another state.

The application of this rule in practice may and does result in the rendition by the supreme federal court of different decisions at different times upon the same question of law. But its decisions are not for that reason inconsistent or conflicting. For in each case of this kind, it does not assume to lay down a rule or principle of law abstractly, and in accordance with its own opinion or conviction of its propriety, but only to ascertain and declare what is the rule of law prevailing in that particular state where the action originated, as evidenced by the determinations of the highest court of that state. To make this plain, let it be supposed, for example, that two cases come before the United States Supreme Court, one from New York and the other from Ohio, each involving the question whether the statute of frauds applies to a given transaction or state of facts, this question having been ruled differently in the two states. In deciding each case in accordance with the law of the state from which it comes, following the judgments of its highest court, the Supreme Court does not declare (in the abstract) that the statute applies, and then declare in another case (in the abstract) that it does not apply, to the same state of facts; but it declares that, in the one state, according to its local law and the decisions of its courts, the statute applies, while in the other state it does not. Thus, in one of the cases, originating in Kansas, it was said: "The supreme court of the adjoining state of

Nebraska, indeed, as the plaintiff in error has pointed out, has held a precisely similar provision of its own statute of limitations not to include the case of a debtor temporarily absent from the state, and having a usual place of residence therein, at which a summons to him might be served. But what may be the law of Nebraska is immaterial. The case at bar is governed by the law of Kansas, and the duty of this court to follow, as a rule of decision, the settled construction by the highest court of Kansas of a statute of that state is not affected by the adoption of a different construction of a similar statute in Nebraska or in any other state." [14] So again: "As to the construction of a state statute, we generally follow the rulings of the highest court of the state, and as to other matters we lean towards an agreement of views with the state courts. So, when the highest court of a state affirms that a conveyance made by a debtor to a trustee for the benefit of creditors is valid under the statutes of that state, we should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many states, and in others a different ruling had obtained." [15] On the same principle, where territory acquired by the United States from a foreign government is divided into several states, and a law general to the whole territory at the time of its acquirement continues in force in the several states, and receives varying judicial interpretations, the United States Supreme Court will adopt whichever interpretation has been placed upon it by the highest court of the state in which the particular suit before it may have originated.[16]

cising a concurrent jurisdiction over the same people and territory should, so far as possible, adopt the same construction of local laws."

[14] Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316, citing Shelby v. Guy, 11 Wheat. 361, 367, 6 L. Ed. 495; Christy v. Pridgeon, 4 Wall. 196, 203, 18 L. Ed. 322; Union Nat. Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 235, 10 Sup. Ct. 1013, 34 L. Ed. 341.

[15] Jencks v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200.

[16] Christy v. Pridgeon, 4 Wall. 196, 18 L. Ed. 322.

WHAT DECISIONS CONTROLLING

135. In order that a federal court should be imperatively bound to accept and follow a decision of the state court upon a question of statutory construction or local law, the decision must possess the following characteristics:

(a) It must be rendered by the highest court or court of last resort in the state.

(b) It must be conclusive and authoritative in the courts of the state where rendered.

(c) It must be based on and determinative of the law of that particular state, as distinguished from decisions on questions of general law and from such as are based merely on grounds of comity or public policy.

(d) It must be a ruling on a controverted question of law, as distinguished from a mere finding of facts or a construction of a particular document.

(e) It must be a direct adjudication upon the precise point of law involved, excluding all obiter dicta and all mere implications or analogies from decisions or judgments.

(f) It may be a single decision; but if so, it must not be inconsistent with former decisions of the same court, or else it must show that it is the final and settled expression of its opinion.

(g) If it involves a change of opinion by the state court, it will not be followed by the federal court in any case where the consequence would be that vested rights would be destroyed or the obligation of contracts impaired.

Some of these essential points will be more fully considered in the succeeding sections of this chapter, such as those relating to the effect of rulings of intermediate and inferior courts, and the proper attitude of the federal courts in the face of conflicting or inconsistent decisions of the state courts, and in respect to changes of opinion of the

state courts which, if followed, would react prejudicially upon contracts or vested rights. The others will now be discussed in their order.

Decision of Highest Court

As a general rule, there is only one court in each state, its highest court or court of last resort, that is entitled to establish the law of the state by its decisions in such sense that the United States courts will feel constrained to accept and follow its rulings. But where a commission is created by law in a particular state, designed to assist the supreme court of the state in disposing of the cases before it, and invested with like jurisdiction and power as that court, the decision of the commission on a question properly presented to it in a judicial proceeding is entitled to the same weight and consideration as would be accorded to a decision of the supreme court of the state on the same question. This is the rule of the United States Supreme Court,[17] and of course it is equally to be observed by the inferior federal courts. But if such a commission renders a decision on the construction of a statute of the state, or any other question of local law, which is squarely opposed to a decision of the supreme court of the state, the federal courts in that state will follow the decision of the permanent tribunal.[18]

Conclusiveness of Decision

If the particular decision is not conclusive in the courts of the state where rendered, it will not create a precedent binding on the federal courts. Thus, in Pennsylvania, it is a peculiarity of the local law that a single verdict and judgment in an action of ejectment are not conclusive on the parties. Hence a decision by the supreme court of that state, on the construction of a will, rendered in an ejectment suit which has not been followed by a concurring verdict and judgment in a second suit of the same kind, is not controlling in an action in a federal court involving the

[17] **Ankeney v. Hannon, 147 U. S. 118, 13 Sup. Ct. 206, 37 L. Ed. 105.**

[18] **Montgomery v. McDermott, 103 Fed. 801, 43 C. C. A. 348.**

same question, though, if the state decision is declaratory of the settled law of the state as to the effect of devises such as that in controversy (instead of being merely an interpretation of the particular will), it will be entitled to consideration as a precedent in the federal courts.[19] But it is not invariably necessary that the particular judgment or decision should be pleadable as a technical estoppel, in order to give it the force and effect of a precedent. Thus, for instance, a decision of the supreme court of a state, on the validity of an issue of municipal bonds, involving the construction of the state constitution and statutes, will be followed by the federal court in an action between the same parties on the same bonds, although, by reason of a nonsuit taken by the plaintiff, the decision of the state court did not pass into a final judgment so as to render the question res judicata.[20] And even though the decisions of the state court should lack that character of finality which is needed to impress them with the technical force of a precedent, it does not follow that they are to be entirely disregarded by the federal courts. Thus, a decision of the highest court of a state, upon the interpretation of a state statute, may fall short of being conclusive upon the federal court sitting in that state, so far as regards a case before it, because rendered after the rights of the parties had vested, or because not given on the merits of the controversy, but on a preliminary motion, application, or proceeding. Yet the decision, as enunciating a rule or principle of law, will be entitled to high persuasive authority.[21]

Decision Establishing Local Law of State

It will be shown more fully in a later chapter that the United States courts do not feel constrained to follow the decisions of the state courts upon questions of general law or jurisprudence. Those decisions are binding as prece-

[19] Barber v. Pittsburgh, Ft. W. & C. R. Co. (C. C.) 69 Fed. 501, affirmed 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925.

[20] Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond, 96 Fed. 293, 37 C. C. A. 493.

[21] Venner v. Atchison, T. & S. F. R. Co. (C. C.) 28 Fed. 581.

dents only in so far as they are concerned with the constitutional or statutory law of the state, or with such principles, growing out of the unwritten law, as have become rules of property within the state or have been incorporated into its own individual and local law. Thus, the federal courts will exercise an independent judgment, without being bound by the decisions of the state courts, upon the question as to what is the common law of the state, unless such decisions have so clearly established a settled rule as to make it a part of the peculiar and local law of that state.[22] For similar reasons, the United States courts are not required to follow state decisions made on grounds of public policy or comity merely, and not expository of the particular law of the state. Thus, a single decision of the supreme court of the state, made a great many years before, holding that, as to property situated in that state, a general assignment made by a debtor in another state would not be allowed to defeat an attachment of such property by one of its own citizens, which decision has never been repeated, will not be accepted as binding on a federal court in the state.[23]

No Question of Law Decided

No decision is entitled to the effect of a precedent unless it determines some controverted question of law or enunciates a rule or principle of law applicable in all similar cases. Hence where the state court adjudges that a certain statute is unconstitutional, basing its decision on its finding as to the terms of the statute or of its title, this is not conclusive or controlling on a federal court in an action between other parties, because merely a finding of fact, not the determination of a question of law.[24] Again, where the decision of the state court is concerned solely with the construction of a will, its judgment may have the technical effect of an estoppel when seasonably presented in another case, in a federal court, between the same par-

[22] Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369.

[23] Stowe v. Belfast Sav. Bank (C. C.) 92 Fed. 90; Belfast Sav. Bank v. Stowe, 92 Fed. 100, 34 C. C. A. 229.

[24] City of Beatrice v. Edminson, 117 Fed. 427, 54 C. C. A. 601.

ties and involving the same question. But there is no such duty devolving upon the federal court to follow the decision of the state court as in the case of the construction of a state statute, unless the opinion of the state court is declaratory of the settled law of the state, and not merely a decision upon the particular instrument in suit.[25]

Scope of Decision; Dicta

The effect of a decision of the highest court of a state, as a precedent to be followed by the federal courts, is limited to the precise question involved and determined.[26] It does not extend to any matters not distinctly presented to the court for its consideration and passed upon by its adjudication. Thus, for example, a decision of the supreme court of a state, interpreting and applying an amendment to the state constitution, is not to be construed as determining the question of the validity of the amendment or whether it was legally adopted, where such question was not raised or considered; and the decision, therefore, does not affect the right and duty of a federal court to consider and determine such question in an action in which it is directly presented.[27] Again, where the determination of some preliminary or jurisdictional question necessarily disposes of the case, and renders a consideration of the merits inappropriate or superfluous, this also has the effect of limiting the scope of the decision as a precedent. Thus, a decision by the highest court of a state, denying a writ of mandamus which was prayed for the purpose of compelling certain action on the part of a water company, is not an authoritative adjudication of the statutory duties and powers of such companies, so as to be binding on a federal court in a suit in equity arising under similar circumstances, where, under the statutes of the state as previously construed, the court must necessarily have held that a proceeding in mandamus would not lie against a corporation of the character of the defendant.[28] Further, an expression of opinion by

[25] Messinger v. Anderson, 171 Fed. 785, 96 C. C. A. 445.
[26] Southern Ry. Co. v. Simpson, 131 Fed. 705, 65 C. C. A. 563.
[27] Knight v. Shelton (C. C.) 134 Fed. 423.
[28] Wiemer v. Louisville Water Co. (C. C.) 130 Fed. 251.

the state court, upon a question not involved in the ascertainment of the right or title in issue between the parties, is not a decision. In other words, the federal courts are not bound or concluded by any mere dicta occurring in the opinions of the state court, however clearly they may indicate or forecast the probable future decision of that court if the matter touched on should come directly before it.[29] But of course there may be circumstances in which such extra-judicial expressions of opinion would be entitled to serious consideration by the federal courts, though not strictly binding on them. It is said that the opinion of a state court upon the construction of a statute of the state is entitled to great weight in the federal courts, even though the question considered was not directly in judgment.[30] But generally, as we have stated, the controlling effect of such a precedent is restricted to the very point in issue, and is not to be extended to principles which are only derivable by inference or implication from the language of the opinion.[31] And if a federal court, in the absence of any authoritative exposition of the law of the state by its courts, has decided a question of local law upon the basis of analogies and implications drawn from previous opinions of the highest state court, but the latter court afterwards announces a different doctrine in a case directly involving the very question, the United States court will abandon its former position and thereafter rule in accordance with the decision of the state court, the rule being to follow the first direct adjudication of the supreme court of the state upon the precise question involved.[32]

Single or Multiple Decisions; Majority Opinions

A succession of uniform decisions by the highest court of a state upon a question of local law is naturally much

[29] Lockhard v. Asher Lumber Co. (C. C.) 123 Fed. 480; Matz v. Chicago & A. R. Co. (C. C.) 85 Fed. 180; In re Sullivan, 148 Fed. 815, 78 C. C. A. 505.

[30] National Bank of Oxford v. Whitman (C. C.) 76 Fed. 697.

[31] Caesar v. Capell (C. C.) 83 Fed. 403.

[32] Andrews v. National Foundry & Pipe Works, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139.

more conclusive evidence of the law of the state than a single and perhaps recent adjudication, and much more likely to remain unchanged. But every settled judicial doctrine must have its starting-point in some single original decision. And a judgment of the highest court of the state, though for the time being standing alone, should be accepted and followed by the federal courts if the opinion is of such a character as to show that it was regarded by the court which rendered it as a final and definitive settlement of the question involved. It is not so easy to say what might be the duty of the federal courts, in this respect, if the opinion of the state court showed that its conclusion was arrived at with great hesitation or reluctance, or seemed to leave an opportunity for a reconsideration of the question. Their rule is to follow "settled" adjudications of the state courts or those which express the "settled law" of the state. Whether or not an isolated decision possesses this character of finality is a question the answer to which must often depend upon the particular circumstances, and which should be solved not only by the application of the ordinary rules for testing the force of precedents, but also in the light of reason and good sense. But it should be remarked that an isolated decision may gain conclusive force by the lapse of time and by its general acceptance. Thus it is said that a single decision of the supreme court of a state, construing a state statute, becomes the settled law of the state, to be followed by the federal courts, where it has been acquiesced in for years by the courts of the state (that is, not challenged in any court) and by its legislative department.[33] The fact that a given decision of the court of last resort of a state did not receive the unanimous consent of the members of that court, but was made by a bare majority of the court, will not prevent it from becoming the law of the state in such sense as to be binding upon the federal courts in cases where it is proper that they should follow it.[34] But on the

[33] German Ins. Co. v. City of Manning (C. C.) 95 Fed. 597.

[34] Southern Ry. Co. v. North Carolina Corporation Commission (C. C.) 99 Fed. 166, citing Williams v. Eggleston, 170 U. S. 311, 18 Sup. Ct. 617, 42 L. Ed. 1047.

other hand, where the highest court of a state is composed of a number of judges, a construction placed upon a statute by the opinion of one judge, which is not concurred in by a majority, is not binding on the federal court, but leaves the question open for its independent determination.[35]

SAME; FICTITIOUS OR TEST CASES

136. When referred to a pertinent decision of the highest court of the state, which ordinarily it would be bound to follow, a federal court will not entertain the suggestion that such decision was rendered in a fictitious or test case, without genuine contest or consideration, and so decline to follow it, unless where the decision was made for the very purpose of anticipating and influencing the judgment of the federal court in an action already pending.

The United States Supreme Court, in an early decision, in which it enumerated or described the circumstances under which it would feel free to reject the authority of a decision of a state court upon the local law of the state, remarked that: "Cases may exist also, when a case is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court." [36] The same reason would be sufficient to justify an inferior federal court in declining to follow an adjudication of the state court. This is well illustrated by a case in one of the circuit courts, where a number of suits had been brought by the owners of a large tract of land to quiet their title to the same. They claimed under a patent from the state, and the disputed question was as to the boundary of the tract. Two of the suits had been decided by the federal court, and the question of boundary adjudicated, and the

[35] San Jose-Los Gatos Interurban Ry. Co. v. San Jose Ry. Co., 156 Fed. 455, 84 C. C. A. 265.

[36] Pease v. Peck, 18 How. 595, 15 L. Ed. 518.

other actions were pending. At this stage, an action of replevin was brought in a state court, between other parties, and nominally for the recovery of a number of logs cut from the tract in question, but the issues were so framed as to raise the question of the boundary, and a decision of that question by the highest court of the state was obtained in that suit, which reduced the area of the tract nearly one-half from that given to it by the decisions of the federal court. The owners of the land were not parties to the action in the state court, and it was apparently brought for the purpose of obtaining such decision, and was not seriously contested. It was held by the federal court that, although the decision of the state court was entitled to consideration and respect, yet it was not controlling on the federal court as a rule for the determination of the cases which remained pending before it. [87]

But such circumstances are exceptional. And unless it is clearly evident that the decision of the state court was made pro re nata, and with a view to its effect on the settlement of litigation pending in the federal courts, the latter courts will not be warranted in inquiring into the basis on which it rests or in according to it any less degree of authority than it appears on its face to be entitled to. The Supreme Court of the United States, when shown a decision of the supreme court of a state construing a state statute, has declared that it cannot entertain the objection that the cause in which it was rendered was a fictitious one, and decline to follow the decision, as not genuinely contested.[88] So also, where a decision of the highest court of the state, construing the state constitution and laws with reference to the power of a municipal corporation to incur indebtedness for waterworks, was urged as conclusive on a United States circuit court of appeals, that court declined to consider an objection that the action in the state courts did not involve a genuine controversy, but was a friendly suit to obtain a favorable interpretation of the

[87] Davis v. Commonwealth Land & Lumber Co. (C. C.) 141 Fed. 711.

[88] East Oakland Tp. v. Skinner, 94 U. S. 255, 24 L. Ed. 125.

constitution to permit the issuance of water bonds.[39] Still less is it permissible to charge the state court with failing to give adequate consideration to the case before it. It will be presumed that its decision was made after thorough consideration of the question involved, and the federal courts cannot entertain a suggestion that it was rendered without full argument and upon the mistaken assumption that the question had been previously decided by the state court.[40]

SAME; RULINGS OF INTERMEDIATE AND INFERIOR COURTS

137. Opinions of the lower courts of a state, or of intermediate appellate courts, though entitled to respectful consideration by the federal courts, are not conclusive authorities, except in cases where their judgments are made final by statute and are not reviewable by the court of last resort.

In numerous states, there are now intermediate tribunals, having appellate jurisdiction in most cases over the county or district courts, but being themselves subject to review by the supreme or highest court of the state, either generally or in specified classes of cases. The decisions of these intermediate courts are entitled to great respect in the federal courts, and are habitually listened to with serious consideration and regarded as persuasive authorities. But they are not imperatively binding or controlling on the courts of the United States, because they do not settle the law of the state, and because the court of highest jurisdiction in the state would not be concluded by such decisions but might lawfully determine the same questions in a different manner, when properly presented to it.[41] It is

[39] City of Sioux Falls v. Farmers' Loan & Trust Co., 136 Fed. 721, 69 C. C. A. 373.

[40] Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843.

[41] Federal Lead Co. v. Swyers, 161 Fed. 687, 88 C. C. A. 547; Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721,

therefore no violation of judicial duty or propriety for a federal court to decline to be guided by the ruling of such a court of the state, if contrary to its own conviction. And of course the remark applies with even greater force to the adjudications of the courts of first instance. Still, even as to the latter, there may be rare and exceptional circumstances in which their decisions would be absolutely binding on the United States courts, even the Supreme Court. Such was the case of Hallinger v. Davis,[42] where a person accused of murder in the Court of Oyer and Terminer of Hudson County, New Jersey, pleaded guilty, and thereupon the two judges of that court proceeded to hear testimony for the purpose of determining the degree of his guilt, and sentenced him to death. In respect to the hearing by the court alone, after his plea of guilty, the defendant claimed that he was deprived of his constitutional right of trial by jury, and that the statute authorizing the trial court to proceed in that manner was contrary to the provisions of the state constitution and void. This was decided against him by the trial court, and it appeared that the law of the state was such that no appeal could be taken to any higher court. He applied for release on habeas corpus to the federal circuit court in New Jersey, and from its refusal to grant the writ appealed to the Supreme Court of the United States. The last named court held itself bound to accept the decision of the Court of Oyer and Terminer as to the validity of the state statute, as tested by the state constitution, and confined its review of the case to the federal question supposed to be involved, saying: "Of course, the de-

68 C. C. A. 89; Stryker v. Board of Com'rs of Grand County, 77 Fed. 567, 23 C. C. A. 286; Continental Securities Co. v. Interborough Rapid Transit Co. (C. C.) 165 Fed. 945; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C.) 129 Fed. 455; Freund v. Yaegerman (C. C.) 27 Fed. 248; Henderson v. Phillips (C. C.) 178 Fed. 374; Patapsco Guano Co. v. Morrison. 2 Woods, 395, Fed. Cas. No. 10,792. But see Seccomb v. Wurster (C. C.) 83 Fed. 856, holding that a decision of an appellate court of the state, construing a state statute, will be followed by a federal court in determining a motion for a preliminary injunction in a taxpayer's suit, though the question has not been settled by the state court of last resort.

[42] 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986.

cision in the present case, of the highest court of the state of New Jersey having jurisdiction, that the statute is constitutional and valid, sufficiently and finally establishes that proposition, unless the proceedings in the case did not constitute 'due process of law,' within the meaning of the fourteenth amendment of the Constitution of the United States." Applying the same principle to the decisions of the intermediate appellate courts, it may be said that it is the duty of the federal courts, in applying state law, to follow such decisions in those classes of cases which are not appealable to the highest court of the state, so that ultimate jurisdiction is lodged in the intermediate court, provided, of course, that its decisions are not in conflict with any actual rulings of the court of last resort.[43] But it appears that a decision of one of these intermediate courts (such as the Appellate Division in New York) is not raised to the character of finality so as to constitute a precedent binding on the federal court, merely because, in the particular case, leave to appeal to the higher court was refused.[44]

ABSENCE OF DECISIONS BY STATE COURT; FEDERAL COURT RENDERING FIRST DECISION

138. If an action in a federal court involves a question arising under the constitution or laws of the state, or otherwise governed by the local law or custom, which has not been passed upon by the highest court of the state, it is the duty of the federal court to solve the question in the exercise of its independent judgment.

139. A federal court will be very reluctant to adjudge a state statute void, as being in conflict with the state constitution, in the absence of any decision

[43] In re Gilligan, 152 Fed. 605, 81 C. C. A. 595.

[44] Continental Securities Co. v. Interborough Rapid Transit Co. (C. C.) 165 Fed. 945.

of the state courts to that effect, and will not do so unless the invalidity of the statute is absolutely clear and free from doubt.

Absence of Decisions of State Courts

Although it is the peculiar province of the state courts to give authoritative rulings upon questions concerning the interpretation of the constitution of the state, the validity and construction of its statutes, and other matters of local law and practice, yet it is equally the duty of the federal courts to resolve such questions in cases where their jurisdiction is properly invoked. If opinions of the highest court of the state are available and in point, they will guide, and indeed govern, the federal courts in the determination of such points of law; but if not, the latter courts must exercise their independent judgment.[45] "The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative decisions of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment. * * * As the very object of giving to the national courts

[45] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Hamilton v. Loeb (C. C.) 179 Fed. 728; Loring v. Marsh, 2 Cliff. 469, Fed. Cas. No. 8,515.

jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." [46]

Postponing Action to Await Decision of State Court

In some instances, where the questions involved are doubtful and such as are peculiarly within the province of the courts of the state, and where litigation involving the same problems is pending in the state courts, it may be proper for a federal court to delay pronouncing its judgment until a decision has been rendered by the highest court of the state, in order that it may be consulted and followed if considered a binding precedent.[47] But this unusual course will not be adopted when it is not clear that the question involved will be determined in the suit pending in the state court, or if it is doubtful whether the state court will consider that the question can properly be raised in the particular form of action or proceeding which has been chosen, or if it is altogether uncertain how long a time must elapse before the state court reaches its conclusion.[48]

Validity and Construction of Statutes

A court of the United States, when determining the rights of parties under a state statute, will be very slow and reluctant to make the first decision against the validity of the statute, as tested by its conformity to the constitution of the state. If the question is at all doubtful, it will not pronounce against the constitutionality of the law unless sustained in so doing by some distinct adjudication of the highest court of the state.[49] If the matter has never

[46] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

[47] Brooks v. Memphis, Fed. Cas. No. 1,954.

[48] City of Detroit v. Detroit City Ry. Co. (C. C.) 55 Fed. 569.

[49] Smith v. City of Fond du Lac (C. C.) 8 Fed. 289; Kane v. Erie R. Co., 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788; Currie v. Town of Lewiston (C. C.) 15 Fed. 377; Gilchrist v. City of Little Rock, 1 Dill. 261, Fed. Cas. No. 5,421.

been determined by the supreme court of the state, it is not improper for the federal court to consult any available decisions of the lower courts of the state; and if they appear to be divided on the question of the validity of the statute, the preponderance of their authority being in favor of its constitutionality, every possible presumption should be indulged in favor of the statute until the impossibility of reconciling it with the requirements of the state constitution is shown beyond any reasonable doubt.[50] For similar and almost equally important reasons, the federal courts are not anxious to render pioneer decisions on the construction of state statutes. The exposition of the acts of the several state legislatures is the peculiar and appropriate duty of the state courts; and a federal court will always feel great reluctance in breaking the way in the interpretation of such statutes, and will not undertake to do so unless it is imperatively necessary for the decision of the case before them.[51]

PRIOR FEDERAL DECISION AND SUBSEQUENT CONTRARY STATE DECISION

140. Where a question arising under the constitution or laws of a state has been decided by a federal court in the preliminary stages of a cause pending before it, and a contrary ruling is made by the highest court of the state on the same question before final disposition of the case in the federal court, the latter will reverse its decision and conform to the judgment of the state court, or, even after final decree, it may recall the case, if still within its control, to change or modify the judgment in accordance with the opinion of the state court.

141. But such a decision of the state court will not constrain the federal court, in subsequent cases, to re-

[50] Kane v. Erie R. Co., 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788.

[51] Coates v. Muse, 1 Brock. 539, Fed. Cas. No. 2,917.

verse its former rulings under which the legal effect of a given transaction or instrument has become fixed or rights of parties have vested.

142. On appeal from an inferior federal court to the Supreme Court of the United States, the latter court will not feel obliged to reverse the judgment because the highest court of the state has meanwhile rendered a contrary decision, but will exercise an independent judgment upon the question involved.

In a case in a circuit court of the United States, the question on demurrer was as to the validity of a state statute under the constitution of the state. This question had never been passed on by the highest court of the state. The federal court decided against the validity of the statute. Afterwards, but before a final decree was entered, the supreme court of the state ruled that the statute was constitutional. In these circumstances, the federal court held that it must reverse its former decision in deference to the opinion of the state court. From the opinion in this case by Mr. Circuit Judge Taft, we quote as follows: "It is pressed upon me that to change my ruling to accord with a subsequent decision of the Supreme Court of Ohio is to make this court nothing but a tribunal for the registering of the decrees of the Supreme Court of Ohio. It is the highest duty of a judge or of a court, when shown that its judgment previously expressed is erroneous, to reverse its former ruling, if that be within its power. The question upon which the demurrer turned in this case, was whether the Nichols law was in violation of the Constitution of Ohio. The court thought that it was, for the reasons stated in the opinion filed. Since that time, the Supreme Court of Ohio has decided differently, and that decision is controlling as the law of the state, whether this court be convinced of the correctness of the reasoning in that opinion or not. The decision by the Supreme Court of Ohio that the Nichols law is constitutional makes it so, for all practical purposes. Counsel for complainants contends that his clients are entitled to the independent judgment of

this court upon the constitutionality of the law. They are; but that judgment must be based on the controlling authorities which come to the knowledge of the court before its final judgment is entered." [52] In another case, a hearing had been had in the federal circuit court, and a decision rendered awarding an injunction as prayed. In the mean time a case was pending in the state courts involving the same question, namely, whether or not a certain statute of the state had been repealed by a later act. After the decision on this point in the federal court, a contrary ruling was made by the supreme court of the state. The term of the federal court at which the opinion was filed had not yet expired, and therefore the case, as the court held, was still within its control. A petition for rehearing or to reopen the case was filed, and this was granted, the case reopened, and a new decision made conforming to that of the state court.[53] In still another case, a judgment in a federal court, in favor of a garnishee, was amended, on his application and in supposed compliance with the law of the state, so as to award him his personal expenses and attorney's fees. Afterwards, the state supreme court, in a case pending before it, decided that the statute did not apply in such cases. It was held that this decision was binding on the federal court and required a reversal of the amending order, notwithstanding the amendment was applied for in good faith by the garnishee.[54] But so far as can be gathered from the very few cases in which this question has arisen, the federal circuit courts of appeals are not very much disposed to recognize the controlling authority of a state decision rendered after a case has come into their hands for judgment. Such a court, in one of the reported cases, declared that it was not bound to yield its own opinion to a contrary decision of the state court of last resort, rendered upon the same transaction, after the argument and before the decision of the case by the federal court, espe-

[52] Western Union Tel. Co. v. Poe (C. C.) 64 Fed. 9.

[53] Southern Ry. Co. v. North Carolina Corporation Commission (C. C.) 99 Fed. 162.

[54] Tefft v. Stern, 74 Fed. 755, 21 C. C. A. 73.

cially where the ruling of the state court appeared to it to be in plain conflict with the weight of authority on the subject and distinctly inconsistent with the previous decisions of the state court.[55] And in any event, a decision of the state court, on the construction of a state statute, will not be considered as of controlling authority while the case is pending on appeal in the Supreme Court of the United States.[56]

Without reference to cases pending at the time, but upon the recurrence of the same question in subsequent and independent controversies, it will of course be the duty of the federal courts to accept and follow a final and settled rule of the state supreme court. But to this rule there is one well-marked exception, viz., that the United States courts will not feel constrained to reverse their former rulings, in deference to a contrary decision of the state court, where the rights and liabilities of parties in particular property or under a given transaction or instrument have become fixed and settled under and in accordance with such former rulings, or contracts entered into under the sanction thereof, which would be retroactively invalidated or disturbed by a reversal of the court's decisions.[57]

When a question arising under the constitution or laws of a state, and which has not yet been settled by the adjudications of the court of chief authority in the state, is determined in a particular manner by the federal circuit court, and an appeal taken to the Supreme Court of the United States, and thereafter, pending the appeal, the supreme court of the state announces a contrary decision, the federal supreme court, in reviewing the judgment of the court below, will not feel bound to follow the decision

[55] Forsyth v. City of Hammond, 71 Fed. 443, 18 C. C. A. 175.

[56] Foote v. Linck, 5 McLean, 616, Fed. Cas. No. 4,913.

[57] Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Western Union Tel. Co. v. Poe (C. C.) 64 Fed. 9; National Foundry & Pipe Works v. Oconto Water Co. (D. C.) 68 Fed. 1006; King v. Dundee Mortgage & Trust Investment Co. (C. C.) 28 Fed. 33; Messinger v. Anderson, 171 Fed. 785, 96 C. C. A. 445; Perrine v. Thompson, 17 Blatchf. 18, Fed. Cas. No. 10,997; Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa (C. C.) 170 Fed. 665.

tween them on their legal merits, or to select which it will follow as a guide to the solution of the question before it. Its plain duty is to follow and apply the latest pronouncement of the highest court of the state, as being the law then current.[64] Thus, the fact that the supreme court of a state, on one appeal, sustained the validity of a statute, does not affect its right to declare the statute void on a subsequent appeal in the same suit, on a ground not presented by the record nor considered on the first appeal, and it is the duty of the federal court, following the latter decision, to adjudge the statute invalid.[65] So, where a question under a statute of a state has been passed on by a federal court in that state, in view of the conflicting opinions of the state courts, the federal court will, in a subsequent case involving the same question, where its attention is called for the first time to a decision of the state court of last resort, definitely interpreting that statute, reverse its former decision and follow the ruling of the state supreme court, although that ruling was made before the earlier decision of the federal court.[66] But an exception is always made where titles have been established, or rights vested or accrued, under and by virtue of decisions of the federal courts which followed and were based on the decisions of the state courts as they stood at the time. Here, if the state court afterwards changes its opinion and renders a decision which, if followed, would have the effect of destroying or impairing those titles or rights, the courts of the United States will not feel constrained to change front with the state court. Though they will lean to an agreement with the state court, and will give careful consideration to its latest adjudications, they will be free to exercise their independent judgment, and

[64] Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Dike v. Kuhns, Fed. Cas. No. 3,907; Smith v. Shriver, 3 Wall., Jr., 219, Fed. Cas. No. 13,108; King v. Wilson, 1 Dill. 555, Fed. Cas. No. 7,810; Yocum v. Parker, 134 Fed. 205, 67 C. C. A. 227.

[65] Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond, 96 Fed. 293, 37 C. C. A. 493.

[66] Tomes v. Barney (C. C.) 35 Fed. 112.

to abide by their own former decisions if not convinced of their incorrectness.[67]

But while it is said that the federal courts, in case of changes of opinion on the part of the state courts, will follow their "latest settled adjudications," yet it is also declared that they cannot be expected to follow oscillations in the process of settlement, and that they will not feel bound by the later decisions unless it is clear that the supreme court of the state regards the question as finally settled.[68] It must be admitted that this rule is somewhat flexible. It is apparent that it leaves it very much to the discretion of the United States Supreme Court to say whether or not it will recognize a decision of the highest court of a state, inconsistent with former decisions or overruling them, as a final settlement of the question. Cases must be very rare indeed in which the state court itself would admit that its solemn adjudication of a question of local law, reversing one or more of its previous decisions and announcing the rule for the future, was not definitive and final, or that it was an "oscillation." And it is historically true that such action on the part of the supreme federal court,—its refusal to follow the state court in a change of opinion from one view to another,—has occasionally aroused the deep resentment of the state courts. Thus, in a notable instance, a question arose in the courts of Iowa as to the validity of a statute of that state which authorized municipal corporations to aid in the construction of railroads and issue bonds for their subscriptions. In several decisions the Supreme Court of Iowa sustained the validity of the statute, but afterwards it overruled the earlier holdings and adjudged the law unconstitutional. This last decision the Supreme Court of the United States

[67] Anderson v. Santa Anna Tp., 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort, 124 Fed. 18, 59 C. C. A. 538; Chisholm v. Caines (C. C.) 67 Fed. 285; Wilson v. Ward Lumber Co. (C. C.) 67 Fed. 674.

[68] Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Wade v. Travis County, 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520; Myrick v. Heard (C. C.) 31 Fed. 241.

refused to follow. It was said: "It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority; they are in harmony with the adjudications of sixteen states of the Union. Many of the cases in the other states are marked by the profoundest legal ability. The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, so far as we are advised, in unenviable solitude and notoriety. * * * We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts, giving constructions to the laws and constitutions of their own states. It is the settled rule of this court, in such cases, to follow the decisions of the state courts. But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice." [69] As might have been expected, the Iowa court was deeply offended by this criticism, and retorted upon the decision of the federal court with strictures hardly less severe. "Not only is the decision under consideration remarkable for bold disregard for precedent, but it is distinguished from all other decisions of the august tribunal that rendered it, as well as from those of all other high courts, in the use of language extremely disrespectful towards the supreme court of a state. It is to be hoped that it may not be followed as a precedent for like offenses against judicial propriety." [70]

Upon this decision in Gelpcke v. Dubuque, it may be remarked, in the first place, that the reason given for not following the latest decision of the Iowa court was not that it did not express the settled law of the state, though it was plainly characterized as an "oscillation," but that it was considered to be unjust, contrary to the weight of au-

[69] Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520.
[70] McClure v. Owen, 26 Iowa, 243.

thority, and unsound in principle. Secondly, it was necessary for the supreme federal court to follow the earlier state decisions, rather than the latest case, in order to sustain rights and interests which had vested under the former construction of the law; and this it will always do, as will be more fully shown in the succeeding sections of this chapter. And third, it was practically admitted that the latest adjudication of the court in Iowa would be accepted as a controlling authority in respect to all similar transactions arising in the future. For it was said: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." [71] However, there are some other cases which furnish plainer indications of what the supreme federal court would regard as a "settled adjudication" of the state court. Thus, it once remarked: "When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. Cases may exist also when a case is got up in a state court for the very purpose of anticipating our decision of a question known to be pending in this court. * * * Such decisions have not the character of established precedents declarative of the settled law of a state." [72] In another case, originating in Ohio, it appeared that the supreme court of that state had declared in favor of the validity of a certain statute of the state, in a single decision, and a few years later had pronounced against the constitutionality of a closely similar act of the legislature. The United States Supreme Court held that, in view of the unsettled character of the decisions of the highest court of Ohio, the federal courts were free to exercise their independent judgment on the question.[73] In an interesting case in a federal circuit court it

[71] 1 Wall. 175, 17 L. Ed. 520.

[72] Pease v. Peck, 18 How. 595, 15 L. Ed. 518.

[73] Pleasant Tp. v. Ætna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864.

appeared that in 1863 the Supreme Court of California had placed a certain construction upon a provision of the state constitution, which construction remained unquestioned by the courts for eleven years, and during that time much legislation was enacted of a nature similar to that originally in question, including the particular statute involved in the case at bar, and that important rights had become vested under these laws. In 1874, the state supreme court, being then differently constituted, overruled the prior decision, three of the six judges who sat in the two cases having taken the one view and three the other. At the time the litigation came into the federal court, the supreme court of the state was about to be again reorganized, with seven members, only one of whom had considered the question as a member of the court of last resort. It was determined by the federal court that the construction of the constitution could not be said to be "settled," within the rule, and consequently that it was at liberty to adopt that view which appeared to it to be correct.[74]

SAME; VESTED RIGHTS AND CONTRACTS

144. Where contracts have been made, titles accrued, or rights vested under the constitution or laws of a state, in advance of any official interpretation of the law by the courts of the state, the federal courts will exercise an independent judgment in suits involving such matters, and are not required to follow decisions of the state supreme court made after the formation of such contracts or vesting of such rights, though prior to the institution of suit in the federal court.

145. So where contracts have been made or rights vested on the faith of decisions of the state court construing its constitution or statutes, the courts of the United States, as to all such prior transac-

[74] Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457.

tions, are free to follow such decisions, notwithstanding a subsequent contrary ruling by the supreme court of the state.

The foregoing rule, in both of its branches, is thoroughly well established in the courts of the United States, and is supported by many authorities.[75] It is somewhat more explicitly stated in an opinion of Mr. Circuit Judge Taft, from which the following quotation is taken: "In certain exceptional cases it is true that the federal courts do not feel bound to follow the decision of the supreme court of the state construing a state law or constitution. When the issue in a circuit court of the United States concerns transactions between individuals entered into on the faith of a particular construction of a state law or constitution, and the circuit court enters a decree sustaining the validity of such construction, all before the supreme court of the state has expressed any opinion on the point, the Supreme Court of the United States will not reverse the decree of the court below, if it otherwise approves it, simply because meantime the state court has given the law or the constitution a different construction.[76] Nor,

[75] Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Pease v. Peck, 18 How. 595, 15 L. Ed. 518; Hager v. American Nat. Bank, 159 Fed. 396, 86 C. C. A. 334; Southern Pine Co. v. Hall, 105 Fed. 84, 44 C. C. A. 363; Speer v. Board of Com'rs of Kearney County, 88 Fed. 749, 32 C. C. A. 101; Bartholomew v. City of Austin, 85 Fed. 359, 29 C. C. A. 568; Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Murray v. Wilson Distilling Co., 164 Fed. 1, 92 C. C. A. 1; Forest Products Co. v. Russell (C. C.) 161 Fed. 1004; Mercantile Trust & Deposit Co. of Baltimore v. Columbus Waterworks Co. (C. C.) 130 Fed. 180; United States Sav. & Loan Co. v. Harris (C. C.) 113 Fed. 27; Brunswick Terminal Co. v. National Bank of Baltimore (C. C.) 112 Fed. 812; Vermont Loan & Trust Co. v. Dygert (C. C.) 89 Fed. 123; Caesar v. Capell (C. C.) 83 Fed. 403; Central Trust Co. v. Citizens' St. Ry. Co. of Indianapolis (C. C.) 82 Fed. 1. But compare Mitchell v. Lippincott, 2 Woods, 467, Fed. Cas. No. 9,665.

[76] Citing Burgess v. Seligman, 107 U. S. 20, 32, 2 Sup. Ct. 10, 27 L. Ed. 359.

when transactions have been entered into by individuals on the faith of a certain construction which has been given to a state statute, or constitution by the Supreme Court of the United States, will that court change its opinion because, subsequent to the transactions involved, the state supreme court has taken a different view.[77] Nor, when different constructions have been given to a statute or a constitution by a state court, are the federal courts bound to follow the later decisions, if thereby contract rights which accrued under earlier rulings would be injuriously affected." [78] In one of the decisions cited by the learned circuit judge (which was a leading case in the United States Supreme Court) we find also an illuminating statement of this general principle. "We do not," said the court, "consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. * * * Where the law has not been thus settled [by a settled course of decisions in the state courts] it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean

[77] Citing Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517.

[78] Western Union Tel. Co. v. Poe (C. C.) 64 Fed. 9, citing Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Supervisors of Carroll County v. United States ex rel. Reynolds, 18 Wall. 71, 21 L. Ed. 771; Rowan v. Runnels, 5 How. 134, 12 L. Ed. 85.

towards an agreement of views with the state courts if the question seems to them balanced with doubt. * * * In the present case, as already observed, when the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transaction which the circuit court was called upon, and which we are now called upon, to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy, and then simply register their decision, or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but, in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion."[79] It will be seen that it is plainly pointed out as the duty of the United States courts, in such cases, to consider with respectful attention the decision of the state court and to incline to an adoption of the same view, if not inconsistent with their convictions. But in so doing, they are of course entitled to take into consideration the various factors which may either add to or subtract from the force of the state decision as a precedent. Thus, a federal court may feel free entirely to disregard a decision of the supreme court of the state when its correctness was subsequently doubted by the court which made it, and it was followed by a divided court only on the principle of stare decisis.[80]

A similar principle may be applied in cases where the decisions of the state court are not concerned with the interpretation of the constitution or statutes, but with the application of principles of local or common law. Thus, it is held that a single decision of a state supreme court, applying principles of the common law to the solution of a

[79] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.
[80] Brunswick Terminal Co. v. National Bank of Baltimore (C. C.) 112 Fed. 812.

question as to the validity of judgments, does not establish a rule of property which is binding upon a federal court, in a case where the rights of a party claiming property under such a judgment became vested before the decision was made.[81]

SAME; VALIDITY OF MUNICIPAL BONDS

146. Where bonds or other obligations of a municipal corporation have been issued under the authority of a state statute, and have been negotiated and passed into the hands of bona fide holders, before the supreme court of the state has pronounced any judgment upon the validity of the statute or of the proceedings for the issue of the bonds, or on the faith of a decision of that court sustaining the constitutionality of the statute or the validity of the issue, the federal courts will refuse to follow a subsequent decision of the state court adjudging the bonds invalid, so far as concerns the status of any bonds which had been so acquired by individuals before the rendition of such later decision.

The foregoing rule may be taken as a corollary to that stated in the preceding section. It must be regarded as one of the most firmly established principles of the federal courts, as shown by their frequent reiteration of it and their practically invariable application of it in the cases before them. It is supported by a multitude of authorities.[82] It

[81] Ryan v. Staples, 76 Fed. 721, 23 C. C. A. 541.

[82] Board of Com'rs of Stanly County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; Barnum v. Town of Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Board of Com'rs of Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642; Folsom v. Township Ninety-Six, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; Loeb v. Trustees of Columbia Tp., 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520; Lee County v. Rogers, 7 Wall. 181, 19 L. Ed. 160; Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Town

has been somewhat differently stated, but as an exposition of the same fundamental principle, in some of the cases which have held that the courts of the United States, in passing upon the validity of state or county bonds, will adopt the construction of state law announced by the state courts at the time the bonds were issued, and on the strength of which they found a market, rather than a contrary construction, announced after the bonds were in circulation as commercial securities.[83] It should be observed that the rule applies not only to decisions upon the basic question of the constitutionality of the statute authorizing the issue of bonds, but also to decisions upon the validity of a municipal election held to determine the question of issuing them, and upon the effect of irregularities in such election or as to the majority of voters requisite to authorize the issue. Unfavorable rulings of the state court upon these points will not be followed by the federal courts, where the effect would be to invalidate the bonds in the hands of bona fide holders.[84]

Various reasons have been given for the existence and enforcement of this rule. It has been said that, where the power to issue bonds was fully conferred by law, the question of their validity in the hands of innocent holders without notice is a question of commercial law, as to which the

of Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523; Town of Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; Rees v. Olmsted, 135 Fed. 296, 68 C. C. A. 50; Board of Com'rs of Henderson County, N. C., v. Travelers' Ins. Co., 128 Fed. 817, 63 C. C. A. 467; Northwestern Sav. Bank v. Town of Centreville Station, Ill., 143 Fed. 81, 74 C. C. A. 275; Board of Com'rs of Franklin County, Ohio, v. Gardiner Sav. Inst., 119 Fed. 36, 55 C. C. A. 614; McCall v. Town of Hancock (C. C.) 10 Fed. 8; Board of Com'rs of Hertford County, N. C., v. Tome, 153 Fed. 81, 82 C. C. A. 215; Coler v. Board of Com'rs of Stanly County (C. C.) 89 Fed. 257; Rondot v. Rogers Tp., 99 Fed. 202, 39 C. C. A. 462; Pickens Tp. v. Post, 99 Fed. 659, 41 C. C. A. 1; Clapp v. Otoe County, Neb., 104 Fed. 473, 45 C. C. A. 579.

[83] In re Copenhaver (C. C.) 54 Fed. 660.

[84] Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Town of Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; Rondot v. Rogers Tp., 99 Fed. 202, 39 C. C. A. 462.

federal courts are always at liberty to exercise their own judgment, or, if they are to be guided at all by the state decisions, then it is a question determinable by the exposition of the law of the state at the period when the bonds were issued, and not to be affected by any subsequent adjudications.[85] Again, it has been said that it is a matter of contract, and "in matters of contract, especially, the right of citizens of different states to litigate in the federal courts of the various states is a right to demand the independent judgment of those courts."[86] But probably the most satisfactory ground on which to rest the rule is that, to give effect to subsequent decisions invalidating such securities in the hands of bona fide holders, would in effect impair the obligation of contracts; and although this constitutional provision is not aimed at the courts or their judgments, yet the tribunals of the United States, being under no imperative duty to conform to the rulings of the state courts, may very properly decline to do so for the sake of saving and protecting contract rights.[87]

Of course it is always and equally their duty to give serious consideration to the decisions of the state court, not to reject them lightly, but to make an effort to bring their own views into harmony therewith, if it can be done without the sacrifice of a real judicial conviction, and especially in all doubtful cases. In exercising its independent judgment upon such a question, a federal court should give effect to rules of construction which had previously been established by the highest court of the state, and should also lean towards an agreement of views with the state court, and not act upon a different view unless compelled to do so to prevent an absolute denial of justice. Such considerations, it is said, have peculiar weight when the question to be determined relates to the jurisdiction or power, under the constitution of the state, of tribunals or

[85] Marshall County Sup'rs v. Schenck, 5 Wall. 772, 18 L. Ed. 556.

[86] Pleasant Tp. v. Ætna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864.

[87] Board of Com'rs of Hertford County, N. C., v. Tome, 153 Fed. 81, 82 C. C. A. 215; Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520.

bodies created by legislative enactment, and charged with the performance of public duties, such as the making of special assessments on private property.[88] In weighing the question, attention should be given to the general course of decisions in the state court, and if these all tend in one direction, and so strongly as to make the latest ruling appear like a violent departure from a previously well-settled doctrine, this will be strong reason for refusing to be guided by it. Thus, where the decisions of the court of last resort of a state, up to the time of the issuance and sale of bonds of a county, all tended to establish the doctrine that a statute which had received the signatures of the presiding officers of the two houses of the legislature could not be collaterally attacked for invalidity in its enactment, a subsequent decision holding the act under which the bonds were issued to be void for this particular reason, does not conclude a federal court in a suit involving the rights of a purchaser of the bonds.[89] So also, where the latest decision of the state court, and which is opposed to the validity of the bonds, is opposed to repeated decisions on other laws involving the same principle, and to the unanimous decisions of courts of other states in analogous cases, the federal court will decline to follow it.[90]

A few remaining observations upon the application of this rule should here be made. Where the question is upon the validity of the authorization for the issue of bonds, and does not depend on any particular provision of the state constitution, but upon general principles of constitutional law, the United States courts will follow a rule, if any there be, established by the adjudications of the supreme federal court, rather than a contrary decision of the state court. Thus, an issue of municipal bonds, not originally authorized, but which the legislature might have authorized and did in fact afterwards ratify, will be held valid in the federal courts, on the well-settled doctrine of the United States Supreme Court of the power of the legislature, in the ab-

[88] O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309.
[89] Coler v. Board of Com'rs of Stanly County (C. C.) 89 Fed. 257.
[90] Talcott v. Pine Grove, 1 Flip. 120. Fed. Cas. No. 13,735.

sence of any provision of the constitution to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the state supreme court adverse to such doctrine, made after the issue of the bonds and the passage of the curative act.[91] It should also be noted that purchasers of the bonds after the decision of the state court adverse to their validity must be considered as having taken them under and subject to that adjudication. But the rights of a prior purchaser may be passed to his assignee. Thus, in one of the cases, bonds of a county were issued to a railroad company, to aid in its construction, and at that time no decision had been given by the state supreme court adverse to the validity of the bonds. The company was therefore entitled as a bona fide purchaser of the bonds to ask that the federal court, in an action on coupons taken therefrom, should make its own decision upon their validity, independently of a subsequent opinion of the state court. It was held that a holder of the bonds and coupons, taking them by assignment from the railroad company, was entitled to the same right, though he may have purchased them after the rendition of the decision of the state court.[92] Finally, if the original decision of the state court is adverse to the validity of the bonds, and adjudges them void, this ruling is binding on the federal courts, at least as to any securities thereafter negotiated or sold.[93]

CONFLICTING STATE AND FEDERAL DECISIONS; DUTY OF INFERIOR FEDERAL COURTS

147. The inferior federal courts will follow a later decision of the state supreme court, rather than an earlier contrary decision of the United States Supreme

[91] Bolles v. Town of Brimfield, 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786.

[92] Board of Com'rs of Onslow County v. Tollman, 145 Fed. 753, 76 C. C. A. 317.

[93] Zane v. Hamilton County, Ill., 104 Fed. 63, 43 C. C. A. 416.

Court, where the question is one of local law, peculiarly within the province of the state courts, and such that the supreme federal court may be expected, according to the settled rules in such cases, to abandon its former position, when the question shall again come before it, and acquiesce in the judgment of the state court.

148. But where the question is one of general law, not local in its nature, and such that the state courts ought to defer to the authority of the United States Supreme Court, the decision of the latter will be followed by the inferior federal courts, rather than a conflicting decision of the state court, as also in cases where the suit involves the same transaction or subject-matter passed upon by the supreme federal court, and in cases where the rights in suit had vested before the decision of the state court.

At an earlier day the rule prevailed quite generally that the inferior courts of the federal system would be constrained to follow the adjudications of the United States Supreme Court in all circumstances, notwithstanding contrary decisions given by the highest court of the state, although these were later in date and even where they related to a matter so peculiarly within the final judgment of the state tribunals as the construction of a state statute.[94] But as the rules governing these matters have become more precise and more definitely settled, it has come to be perceived that no such unvarying principle could be successfully applied in practice. There are cases in which the Supreme Court of the United States will defer to and follow the latest adjudications of the highest court of a state, although these are directly contrary to its own views as previously expressed. When such a case arises in an inferior federal court, it is plainly its duty to accept and fol-

[94] See Neal v. Green, 1 McLean, 18, Fed. Cas. No. 10,065; Foote v. Johnson County, 5 Dill. 281, Fed. Cas. No. 4,912; Westermann v. Cape Girardeau County, 5 Dill. 112, Fed. Cas. No. 17,432. Compare The Princess Alexandra, 8 Ben. 209, Fed. Cas. No. 11,430.

low the decision of the state court, rather than to decide in accordance with an earlier and conflicting ruling of the supreme federal court. For it is a presumption of law (at least in a plain case) that the latter court, upon a recurrence of the question before it, will forsake its former views, or lay them aside, and render a new decision in accordance with the new ruling of the state court. And if the lower federal court should fail to anticipate such action, and on the contrary should reject the authority of the state decision and follow the earlier federal decision, it would simply be rendering a judgment in the expectation of its reversal on appeal. It may therefore be stated as a general rule that, where the question is one which the state court is entirely at liberty to settle for itself, and as to which all other courts should follow it, the lower courts of the United States will pursue that course, though they may be obliged to disregard an earlier and conflicting decision of the federal supreme court.[95] This may also be done in some cases where it is necessary to prevent a denial of justice. For instance, an action was brought in a federal circuit court against a citizen of Minnesota to rescind a sale of personal property because of fraud of the purchaser. The defendant was not the original purchaser, but a transferee of the goods, who took the same in good faith and without notice of his vendor's fraud in procuring them, and who, as a part of the consideration for the transfer, assumed debts of his vendor. The Supreme Court of Minnesota had held that a transferee of goods under such circumstances was entitled to the rights of a bona fide purchaser for value. But the opposite doctrine was maintained by the Supreme Court of the United States. In this case, the debt assumed by the transferee was due to a citizen of the same state, Minnesota, so that the question of his liability on his assumption was solely within the jurisdiction of the state court, which would of course require him to pay the debt, while refusing to rescind the sale; whereas the rule given by the supreme federal court would release him from pay-

[95] New Orleans Waterworks Co. v. Southern Brewing Co. (C. C.) 36 Fed. 833; Leslie v. Urbana, 8 Biss. 435, Fed. Cas. No. 8,276.

ing the debt, but would cancel the sale. In this dilemma, the federal circuit court decided to follow the decision of the state court, rather than that of the United States Supreme Court, because to do otherwise would result in depriving the transferee of the goods and at the same time compel him to pay for them.[96]

But on the other hand, where the question is not local in its nature, or does not grow out of the constitution or laws of a particular state, but is to be determined on principles of general law or jurisprudence, the United States Supreme Court will not abandon its views formerly expressed and change the course of its decisions, merely in deference to a contrary ruling of the highest court of the state in which the action originated. And in such a case it is manifestly the duty of an inferior court to disregard later rulings of the state court, if the case before it comes plainly within a rule positively announced by the supreme federal court in an earlier decision.[97] Moreover we have seen, in the earlier sections of this chapter, that the United States Supreme Court will not reverse its former rulings, or reverse a judgment of a lower federal court, in deference to a contrary decision by the state supreme court, where the rights, contracts, or transactions in suit and to be affected by the decision had vested or had occurred before the judgment of the state court was pronounced. And it is now to be added that, where these particular circumstances combine, it is the duty of an inferior federal court to decide in accordance with an earlier ruling of the federal supreme court, rather than a later one by the state court, even though the question arises upon the construction of a state statute.[98] And this rule also applies where the question decided by the United States Supreme Court was between the same parties and grew out of the identical transaction or subject-matter presently in suit.[99]

[96] Sonstiby v. Keeley (C. C.) 11 Fed. 578.

[97] Edwards v. Davenport (C. C.) 20 Fed. 756; Belfast Sav. Bank v. Stowe, 92 Fed. 100, 34 C. C. A. 229.

[98] Adelbert College of Western Reserve University v. Wabash R. Co., 171 Fed. 805, 96 C. C. A. 465.

[99] City Water Supply Co. v. City of Ottumwa (C. C.) 120 Fed. 309.

CHAPTER XIII

SAME; MATTERS OF LOCAL LAW AND RULES OF PROPERTY

149. General Rule.
150. Questions of Public Policy.
151. Rules of Property in General.
152. Law of Real Property.
153. Mortgages, Foreclosure, and Redemption.
154. Acknowledgment and Record of Deeds.
155. Adverse Possession and Color of Title.
156–157. Wills and Descent and Distribution of Property.
158. Nature and Effect of Contracts.
159–160. Transfer and Incumbrance of Chattels.
161. Liens.
162. Law of Corporations.
163. Rights and Liabilities of Municipal Corporations.
164. Domestic Relations.
165. Interest and Usury.

GENERAL RULE

149. Rules of property established by the judicial decisions of the highest court of a state, and also general rules and principles of jurisprudence locally developed and peculiar to the given state, whether statutory or growing out of common law, when similarly established, will be accepted and followed by the United States courts without inquiry into their legal correctness, no federal question being involved.

When a case comes before a federal court for adjudication, not on the ground of its involving a federal question, but because the federal jurisdiction is invoked as between citizens of different states, and therefore the law to be applied to its settlement is the law of the state where the court sits, the United States court will not attempt to expound or determine for itself the applicable rules of law, except in the absence of any decisions of the highest court of the state thereon. If, on the other hand, that court has

announced and expounded the law of the state,—that law which is local and the peculiar product of its own legislative and judicial activity,—or if it has, by its decisions on particular questions, established rules of property governing the courts and citizens of the state, the federal court will accept and apply the law as thus laid down and follow the rulings of the state court, without regard to its own opinion of their legal correctness or soundness. This rule applies to all the courts of the United States, including the Supreme Court.[1] In one of the opinions of that court it was said: "It may be said generally that, wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the state, the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of Burgess v. Seligman.[2] Where such local law or custom has been established by repeated decisions of the highest courts of a state, it becomes also the law governing the courts of the United States sitting in that state."[3]

While this rule has perhaps an especial force when the decisions in question relate to the construction of the statutory law of the state, it is hardly less imperative when applied to the solution of those questions which grow out of the local usages or customs or other peculiarities of the jurisprudence of the particular state. Thus, it is observed that, where a decision of the highest court of a state, al-

[1] Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; Mutual Assur. Soc. v. Watts, 1 Wheat. 279, 4 L. Ed. 91; Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117; Johnston v. Straus (C. C.) 26 Fed. 57; Van Bokelen v. Brooklyn City R. Co., 5 Blatchf. 379, Fed. Cas. No. 16,830; Illius v. New York & N. H. R. Co., Fed. Cas. No. 7,010.

[2] 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

[3] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

though based upon the common law, is deemed of an application especially local, its authority in a federal court is almost as great as would be given to it if it interpreted a state statute, particularly if the rule thereby established pertains to real property.[4] Nor is the rule restricted to the administration of civil justice, but may apply also in criminal cases. Thus, where the state constitution limits the authority of the governor to grant a reprieve to a certain number of days after "conviction," it is for the courts of the state to say whether the time begins to run from the date of the verdict or from that of the sentence; and if the court of final appeal in the state has decided this question, the courts of the United States are bound to accept its decision. Therefore they have no power to discharge a prisoner on the ground that such decision, in his particular case, operated to deprive him of due process of law or of any other privilege or immunity secured to him by the federal constitution.[5] The same rule applies also to those questions of a quasi-political character which the courts are sometimes compelled to answer, though they prefer to refer them to the executive and legislative departments. Thus, if the courts of a state have given a decision on the question whether the existing state government has been lawfully established, the courts of the United States are bound to follow them and will not review their decision.[6] This was also the ground of the decision in the celebrated "Dred Scott Case." The question was as to the status of a person who was held in slavery in a particular state and was taken by his master into a free state for a temporary residence, and thence returned with his master to the first state and resumed his residence there. It was held by the United States Supreme Court that the question was exclusively a question of the law of that state and that the decisions of its courts thereon were conclusive on the federal courts.[7]

[4] Percy Summer Club v. Astle, 163 Fed. 1, 90 C. C. A. 527.
[5] Lambert v. Barrett, 157 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865.
[6] Luther v. Borden, 7 How. 1, 12 L. Ed. 581.
[7] Scott v. Sandford, 19 How. 393, 15 L. Ed. 691.

QUESTIONS OF PUBLIC POLICY

150. When the question is whether a given contract or transaction is contrary to the public policy of a state, as ascertained from its statutes and the judgments of its courts, or contrary to the policy of the law as understood and applied by its courts, the federal courts will accept and follow the decisions of the courts of the state.

The public policy of any political community, such as one of the American states, is primarily to be determined from its constitution and statutes. It is properly a legislative function, and not a judicial function, to define and enunciate the public policy of the state, and to declare that certain acts, contracts, or transactions shall be deemed inimical to the general welfare, inconsistent with the ethical standards of the times, or demoralising to the community. For the guardianship of the public welfare is committed to the legislature, not to the courts.[8] But the courts are often called upon to say whether or not a given transaction or arrangement is against public policy, when the answer must depend, not upon the explicit prohibitions of any statute, but upon considerations drawn from the general trend of legislation in the state, or the spirit, purpose, and apparent general policy of the statutes. Now public policy may be general or local; or, to speak more accurately, the general question of public policy may be involved in matters which are of general public concern or matters which concern a narrower and territorially restricted public. In

[8] A statute cannot be declared invalid on the ground of its being contrary to public policy: because the public policy of a state is found in, and can be predicated upon, the constitution and laws of the state and not elsewhere, and a statute constitutionally enacted gives expression to what the courts must consider the public policy of the state, without regard to prior judicial utterances. See United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Langmuir v. Landes, 113 Ill. App. 134; Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 Atl. 249; De Ferranti v. Lyndmark, 30 App. D. C. 417.

this sense, there is a public policy of the nation, which is applicable to all matters wherein the people at large are interested, including those committed to the control of the federal government, and coextensive with the boundaries of the Union, and a public policy of any given state, which is adapted to the circumstances of the locality embraced within the boundaries of the state, and applicable to all matters within state control.[9] As to the latter, there is notoriously much difference of opinion in the various states, and there is no kind of obligation resting upon either the legislature or the courts of any state to bring its doctrines into harmony with those of any other state. It is within the unquestioned and uncontrolled power of each of the states to determine its own public policy with reference to all matters within its exclusive jurisdiction. Public policy, therefore, so far as it relates to matters of this kind, is a question of local law; and the courts of the United States, when they are called upon to administer the local law, must find it, if not in the statutes of the state, then in the decisions of its courts. Hence the rule that the federal courts will follow the decisions of the highest court of the state wherein they sit in determining whether given contracts or transactions are contrary to the public policy of the state, when no federal question is involved, nor any principle of mercantile law or of general jurisprudence of national or universal application.[10] Thus, for example, a decision of the highest court of a state, holding that a contract exempting a railroad company from liability for negligence in setting fire to a storage warehouse on the railroad right of way is not against public policy, is conclusive on a federal court sitting in that state.[11] And where the

[9] Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co. (C. C.) 62 Fed. 904.

[10] Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; McCue v. Northwestern Mut. Life Ins. Co., 167 Fed. 435, 93 C. C. A. 71; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; Blackwell v. Southern Pac. Co. (C. C.) 184 Fed. 489.

[11] Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

public policy of a state has been declared by statute or by the uniform decisions of its courts, it will be understood and applied by the federal courts in the same way as to contracts or other matters governed by the law of that state, although it may be contrary to what has been independently determined by the United States courts as the true public policy.[12]

There is also a "policy of the law," which is often taken to be synonymous with "public policy," but really bears a slightly different meaning. It is more particularly the creation of the courts than of the legislature. It finds its application in cases where the courts have a greater or less measure of judicial discretion, as in granting or refusing remedies and in the application of equitable principles generally. It may be defined as that disposition or attitude of the law (considered as personified and speaking through the courts) which leads it to discountenance certain classes of acts, transactions, or agreements, or to refuse them its sanction, because they are deemed detrimental to the public welfare, subversive of good order, or obstructive to the equal and efficient administration of justice. In this sense, the policy of the law, as it is to be understood and enforced in each particular state, is a matter for the determination of the courts of that state. It is a rule of local law, as to which the United States courts will accept and follow the adjudications of the courts of that state, without independent inquiry or examination. Thus, if it can be ascertained from the decisions of the highest court of a state that the policy of the law in that state is not to permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor, such decisions will be followed by a federal court in which the validity of a sale of such property in that state, as against attachment creditors, is in question.[13]

[12] McCue v. Northwestern Mut. Life Ins. Co., 167 Fed. 435, 93 C. C. A. 71.

[13] Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457.

RULES OF PROPERTY IN GENERAL

151. Decisions of the highest court of a state upon its constitution or statutes or its local law, and which constitute rules of property within the state, will be followed without question by the courts of the United States.

The general nature and the essentials of decisions constituting rules of property have been fully considered in an earlier chapter.[14] It remains to be stated in this connection, as a principle of the very highest importance in the relations between the state and national courts, that when a rule laid down and firmly established by the supreme court of a state, either in one decision or a consistent series of decisions, relates to the acquisition, transfer, or incumbrance of any recognized species of property, and has come to be recognized by the courts and the community generally as a rule of property, to be relied on as settled and as governing the kind of transactions to which it relates, in so much that the courts of the state would not feel free to overrule it even though they should be judicially convinced that it was unsound or incorrect, then the federal courts in that state, when administering the law of the state and in all applicable cases, will adopt and follow the same rule without inquiry into its legal correctness.[15] It has been said that this principle is to be applied only in cases where no right under the federal constitu-

[14] Supra, Chapter V.

[15] Shipp v. Miller, 2 Wheat. 316, 4 L. Ed. 248; City of Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298; Leffingwell v. Warren, 2 Black. 599, 17 L. Ed. 261; Nichols v. Levy, 5 Wall. 433, 18 L. Ed. 596; Orvis v. Powell, 98 U. S. 176, 25 L. Ed. 238; Bondurant v. Watson. 103 U. S. 281, 26 L. Ed. 447; Taylor v. Ypsilanti, 105 U. S. 60. 26 L. Ed. 1008; Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404. 44 L. Ed. 555; Burham v. Fritz (C. C.) 13 Fed. 368; Taylor v. Holmes (C. C.) 14 Fed. 498; Hazard v. Vermont & C. R. Co. (C. C.) 17 Fed. 753; Buford v. Holley (C. C.) 28 Fed. 680; Independent Dist. of Pella v. Beard (C. C.) 83 Fed. 5. A ferry franchise is property, and a decision of a state court supporting it is a rule of property to be

tion or laws is concerned and no question of general law involved.[16] As to the former part of this proposition there can be no doubt. When construing or applying the organic or statutory law of the Union, the federal courts are in no wise bound by any decisions of the state courts. But as to the latter part, we apprehend the true rule to be that, even if a question of general law is involved, yet if that question has been finally and firmly settled by the courts of the state, so far as they are concerned, and their ruling is acquiesced in and relied on by the people of the state, it must be considered as having become so far a part of the local law of the state that the United States courts ought to feel themselves precluded from declaring a different rule on the same subject in the same state, whatever might be their views on the particular point as an abstract question. But to establish a rule of property it is necessary that there should have been an explicit decision of the highest court of the state upon the precise point. Lacking this, a federal court will be entirely free to follow its own judgment. For example, the fact that the supreme court of a state, in a former decision, in which the claim of a railroad company to be exempt from state taxation was not controverted, assumed that the company was exempt, which decision was followed by the federal court in a case wherein no questions were considered except such as had been previously considered by the state court, does not establish a settled rule of property to which the federal court is bound to adhere.[17] And again, a decision does not take on the character of a rule of property until it has been accepted and acted on for a considerable length of time, actually or presumptively, or at least until there has been time for rights to vest under it or contracts or business dealings to be made with reference to it. Thus, it is declared that a decision of the highest court of a state, adjudging void a con-

followed by the federal courts. Conway v. Taylor's Ex'r, 1 Black, 603, 17 L. Ed. 191.

[16] Traer v. Fowler, 144 Fed. 810, 75 C. C. A. 540.

[17] Keokuk & W. R. Co. v. Scotland County Court (C. C.) 41 Fed. 305.

tract made by a city as beyond its constitutional powers, is not binding on a federal court in a suit involving the rights of a citizen of another state, unless the rule applied in such decision has been so long and firmly established as to have become a rule of property within the state at the time the contract was made.[18]

LAW OF REAL PROPERTY

152. The federal courts will adopt and apply the local law of real property, as ascertained by the decisions of the courts of the particular states, whether those decisions are grounded on the statute law of the state or form a part of its unwritten law.

It is a settled principle of private international and interstate law that landed property is always governed by the law of the jurisdiction wherein it lies. And it is peculiarly the province of the legislative and judicial authorities of a state to settle and determine, by statute and decision, what shall be the rules governing the title, acquisition, transfer, incumbrance, and incidents of real estate within the state. On all such questions, therefore, saving only rights claimed under the constitution or laws of the United States, the federal courts will look to the decisions of the highest court of the state in which they sit, and will be governed by them and follow them without question, and the Supreme Court of the United States will likewise respect the decisions of the highest court of the state in which the land in controversy is situated.[19] Rules so established

[18] Columbia Ave. Savings Fund, Safe Deposit, Title & Trust Co. v. City of Dawson (C. C.) 130 Fed. 152.

[19] McKeen v. Delancy, 5 Cranch, 22, 3 L. Ed. 25; Polk v. Wendal, 9 Cranch, 87, 3 L. Ed. 665; Thatcher v. Powell, 6 Wheat. 119, 5 L. Ed. 221; Jackson ex dem. St. John v. Chew, 12 Wheat. 153, 6 L. Ed. 583; Henderson v. Griffin, 5 Pet. 151, 8 L. Ed. 79; Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168; Beauregard v. City of New Orleans, 18 How. 497, 15 L. Ed. 469; Middleton v. McGrew, 23 How. 45, 16 L. Ed. 403; League v. Egery, 24 How. 264, 16 L. Ed. 655; Williamson v. Suydem, 6 Wall. 723, 18 L. Ed. 967; Williams v. Kirtland, 13

become emphatically rules of property, upon which the safety and repose of titles depend; and even though the supreme federal court should be convinced that a rule so settled in the courts of a state is wrong in principle and indefensible in law, yet it will refrain from laying down a different rule, and will acquiesce in that maintained by the courts of the state, where it is evident or even probable that many titles would be shaken by a departure from the previous decisions.[20] This principle has been not only accepted and acted on by the federal courts themselves, but has been at times quite sharply asserted by the state courts, as witness the declaration of the Kentucky Court of Appeals that the federal courts cannot enforce within the ter-

Wall. 306, 20 L. Ed. 683; Walker v. State Harbor Com'rs, 17 Wall. 648, 21 L. Ed. 744; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555; Abraham v. Casey, 179 U. S. 210, 21 Sup. Ct. 88, 45 L. Ed. 156; Lauriat v. Stratton (C. C.) 11 Fed. 107; Myers v. Reed (C. C.) 17 Fed. 401; Edwards v. Davenport (C. C.) 20 Fed. 756; Myrick v. Heard (C. C.) 31 Fed. 241; Hoge v. Magnes, 85 Fed. 355, 29 C. C. A. 564; Rummel v. Butler County (C. C.) 93 Fed. 304; Belding v. Hebard, 103 Fed. 532, 43 C. C. A. 296; Hubbird v. Goin, 137 Fed. 822, 70 C. C. A. 320; Haggart v. Wilczinski, 143 Fed. 22, 74 C. C. A. 176; Paine v. Willson, 146 Fed. 488, 77 C. C. A. 44; Gillespie v. Pocahontas Coal & Coke Co., 163 Fed. 992, 91 C. C. A. 494; Barker v. Jackson, 1 Paine, 559, Fed. Cas. No. 989; Newman v. Keffer. Fed. Cas. No. 10,177; Loring v. Marsh, 2 Cliff. 311, Fed. Cas. No. 8,514; In re Zug, Fed. Cas. No. 18,222. Though the federal courts ordinarily decline to declare against the title to land, on the ground that it is strictly within the province of the state courts, yet in a suit by a railway corporation, resident in one state, against citizens of another state, seeking to recover from the defendants land awarded to the corporation in violation of the state law that a railway corporation can only hold land for the purposes for which it is organized, the federal court will hold title to the land invalid according to the provisions of the state law. Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513. The federal supreme court does not recognize, as in any way binding on it as a part of the local law, decisions of state courts on a private act of the legislature providing for the alienation of private estates by particular persons, under the sanction of a court or chancellor, such decisions forming no part of the local law of real property. Williamson v. Berry, 8 How. 495, 12 L. Ed. 1170.

[20] Bodley v. Taylor, 5 Cranch, 191, 3 L. Ed. 75.

ritorial limits of Kentucky a rule of property affecting the title to real estate different from and subversive of the state laws as construed and expounded by its highest court, as the United States Supreme Court is required to follow the laws of the several states as rules of decision whenever they apply.[21] But it should be noted, not so much in the nature of an exception to this rule, as a case where it cannot apply, that if there has been no decision on a particular question of real-property law by the state courts until after the accruing of a cause of action on which a suit is brought in a federal court, the latter is not bound to follow a decision of the state court pending the action; for the rights of the parties are governed by the law as it stood at the institution of suit, and it could not be said that, at that time, there was any settled judicial exposition of the law of the state.[22]

General Illustrations; Public Lands, Grants, and Titles

The question as to the rights of any of the maritime states in or over marsh and tide lands on the borders of the sea or its estuaries is a question of local law. There is no universal rule on this subject. Each state has dealt with the lands under tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands or granting out rights there, as it is considered for the best interests of the public. And accordingly the question is to be determined according to the decisions of the supreme court of the state, which will be followed without hesitation by the federal courts.[23] So also, the decisions of a state court as to the legal effect of certain royal charters, by which the state claims certain rights as against individuals, are entitled to great if not controlling weight in the Supreme Court of the United States in a case involving the rights litigated in the state

[21] Perry v. Wheeler, 12 Bush (Ky.) 541.

[22] Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228.

[23] Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Chisholm v. Caines (C. C.) 67 Fed. 285.

courts.[24] So also of a decision of the highest court of the state as to the relative priority of certain grants by the state.[25] And so of a rule established by the chief court of a given state that a pre-emption right to islands in the great rivers of the state cannot be obtained by settlement.[26] In fact, so great is the respect paid to the decisions of the local courts on the titles and rights to real property that the rule has sometimes been extended to cases where the foundation of title was an instrument peculiarly within the cognizance of the federal courts. At least we have a late decision to the effect that decisions of the supreme court of a state respecting the title acquired by individuals under a treaty made by the national government to land within the state, will not be disturbed by the United States Supreme Court where they have become a rule of property, and do not clearly involve a misinterpretation of the words of the treaty.[27]

Construction of Deeds

The interpretation of a particular word or clause in a deed is not strictly a matter of local law, and on a question of this kind a federal court may and should exercise its independent judgment. Yet it will incline very strongly to adopt the construction placed on a similar deed by the highest court of the state, and will ordinarily do so without hesitation, where, under the rulings of the state courts, such construction becomes a rule of property.[28] Thus, if the court of last resort in a state has settled the rule that a deed of land within the state expressly reserving a vendor's lien does not vest the legal title in the vendee, the federal courts will accept and apply the same rule.[29] And so also, the construction given by the highest court of a state to a conveyance of mining property, as not including

[24] Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997.

[25] North Carolina Min. Co. v. Westfeldt (C. C.) 151 Fed. 290.

[26] Fisher v. Haldeman, 20 How. 186, 15 L. Ed. 879.

[27] Francis v. Francis, 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed 165.

[28] Kuhn v. Fairmont Coal Co., 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711.

[29] Oliver v. Clarke, 106 Fed. 402, 45 C. C. A. 360.

the portion of a vein beneath the surface and within the converging lines, produced, of the grantor's location, will be followed by the federal supreme court on a writ of error to the state court.[30]

Leases of Realty

Generally speaking, all questions relating to leases and the rights, liabilities, and remedies of parties thereto, are matters of local law, in which the courts of the United States will follow the decisions, if any, of the state courts where the property is situated. Thus, the question whether an oral lease for more than a year, not complying with the statute of frauds of the state where the property lies, is a mere nullity or is voidable only at the election of the parties, is not a question of general jurisprudence or of commercial or mercantile law, but a rule of property, which must be determined in the federal courts according to the decisions of the highest judicial tribunal of the state.[31] So, in an action in a federal court for breach of the covenant of quiet enjoyment contained in a lease of real property, the question whether the eviction was by virtue of the act of the holder of a paramount title, for whose acts the defendant was responsible, is a question of local real-property law, to be determined by the decisions of the court of last resort of the state.[32] So again, the decisions of the courts of a state as to the construction and effect of mining leases therein establish a rule of property which will be recognized and followed by the federal courts.[33] A like conclusive authority is given to a decision of the highest court of the state that a landlord, in the absence of distraint, is not entitled to priority for rent in arrear on the insolvency of the tenant.[34] And again, on the question of the measure of damages in an action in a federal court for evicting a lessee or for breach of the covenant for quiet en-

[30] East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476.

[31] York v. Washburn, 129 Fed. 564, 64 C. C. A. 132.

[32] Pabst Brewing Co. v. Thorley, 145 Fed. 117, 76 C. C. A. 87.

[33] Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178, 32 C. C. A. 560.

[34] In re Chaudron & Peyton (D. C.) 180 Fed. 841.

joyment, the court will be governed by the decisions of the highest court of the state, in so far as they determine the question.[35]

Actions and Proceedings; Effect of Judgments and Decrees

In all actions concerning real property, the federal courts will ordinarily, and as a matter of obligation, follow the decisions of the state courts upon such matters as relate to the requisites and incidents of the action and the consequences and effect of the judgment or decree.[36] Thus, it is said that state statutes relating to the removal of clouds from title to land are obligatory on the federal courts, and that a uniform and stable body of judicial decisions on that subject, from the court of last resort of the state, is equally binding.[37] Again, where the courts of a state have held that an adjudication of bankruptcy has the same effect upon a wife's claim to dower as a judicial sale of the husband's real estate, the federal courts will follow that rule in regard to land within that state.[38] So also of the rule settled by the state court as to the time from which the filing of a notice of lis pendens takes effect as against purchasers and incumbrancers.[39] And a state statute regulating the rights of the parties where a conveyance is set aside as fraudulent at the instance of creditors of the grantor, will be applied by the federal courts sitting in that state in respect to property therein, and of course in accordance with its construction as fixed by the courts of the state.[40] So also, in a suit for partition, removed into a federal court, that court will follow the state decisions holding that a right of entry in the plaintiff, without actual seisin, is sufficient.[41] It is also of some importance to observe that, in the action of ejectment, the federal courts, including the

[35] Thorley v. Pabst Brewing Co., 179 Fed. 338, 102 C. C. A. 522; American Ice Co. v. Pocono Spring Water Ice Co. (C. C.) 179 Fed. 868.

[36] Seefeld v. Duffer, 179 Fed. 214, 103 C. C. A. 32.

[37] Lamb v. Farrell (C. C.) 21 Fed. 5.

[38] Warford v. Noble, Fed. Cas. No. 17,175.

[39] United States v. Chicago, M. & St. P. R. Co. (C. C.) 172 Fed. 271.

[40] Claflin v. Lisso (C. C.) 27 Fed. 420.

[41] McClaskey v. Barr (C. C.) 42 Fed. 609.

Supreme Court, will follow the law of the state where the land lies.[42] It will be remembered that, in consequence of the peculiar nature of this action, the judgment in it was not conclusive at common law in any other action between the same parties. But this has been quite generally changed by statute. And a state law, enacting that a judgment in ejectment, provided the action be brought in a form which gives precision to the parties and the land claimed, shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as of practice, and, the judgment being conclusive on title in the courts of the state, it is also conclusive in those of the United States.[43] The principle is the same where the statute directs that two concurring verdicts and judgments in ejectment shall be conclusive of title.[44] But in Pennsylvania, an important early case laid down the rule that an action of ejectment brought to compel the specific performance of a contract for the sale of lands (familiarly known in that state as an "equitable ejectment"), is a mere substitute for a bill in equity for the same purpose, and a judgment in such action is equivalent to a decree for specific performance; and since a decree is conclusive between the parties, one judgment in this kind of action is conclusive also; and it was further held that the statute making two concurrent verdicts and judgments in ejectment conclusive upon the title had no application to actions of ejectment brought to compel the payment of money or the specific performance of a contract of sale, or, generally, on an equitable title; and this rule has ever since been recognized as settled law in that state.[45] Therefore the federal courts have recognized it as a rule of property in Pennsylvania, and declare it to be equally binding upon them as upon the courts of the state.[46]

[42] Davis v. Mason, 1 Pet. 503, 7 L. Ed. 239.

[43] Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Hiller v. Shattuck, 1 Flip. 272, Fed. Cas. No. 6,504.

[44] Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816.

[45] See 2 Black, Judgm. § 651, and cases cited.

[46] Bryar v. Bryar (C. C.) 78 Fed. 657, affirmed Bryar v. Campbell, 90 Fed. 690, 33 C. C. A. 236.

Exemption Laws

The exemption laws of the several states apply to the proceedings of the federal courts within their borders, both in respect to their ordinary final process and also under the national bankruptcy law. And therefore, in case of any doubt as to the meaning or application of those laws, or as to the amount or kind of property intended to be exempted, the federal courts will look to the decisions of the state courts and will be governed by them.[47]

Law of Judicial Sales

All questions relating to the validity and effect of sales of real property under judicial process, as those made by sheriffs on writs of execution, and of the nature and incidents of the title acquired by the purchaser, are questions of purely local law, which each state may and does settle for itself; and in matters of this kind, arising in the federal courts, the pertinent decisions of the highest court of the state will furnish the rule for their guidance which will be adopted and applied without independent inquiry into the principles of law involved.[48]

Law of Fixtures

This also is a matter of purely local law, and one on which the doctrines prevailing in the different states are by no means uniform. Hence, in determining the circumstances in which an annexation of chattels to realty is to be considered as constituting them a part of the realty, the federal courts will ascertain the local law of the state wherein they sit, or rather of the state in which the property is

[47] Thompson v. McConnell, 107 Fed. 33, 46 C. C. A. 124; Manufacturers' & Farmers' Bank v. Bayless, Fed. Cas. No. 9,050; Gilman v. Williams, 7 Wis. 329, 76 Am. Dec. 219. But it has been held that a suit, after it shall have been commenced in a federal circuit court, cannot be affected by a state law extending the exemption of the property of the defendant, such law never having been adopted by the federal court, and where the law previously adopted authorized an exemption to a more limited extent. See Lawrence v. Wickware, 4 McLean, 56, Fed. Cas. No. 8,148.

[48] Jeter v. Hewitt, 22 How. 352, 16 L. Ed. 345; Henry v. Pittsburgh Clay Mfg. Co., 80 Fed. 485, 25 C. C. A. 581; Western Pac. R. Co. v. Southern Pac. Co. (C. C.) 144 Fed. 160.

situated, by consulting the decisions of the highest court of that state; and when these decisions are explicit and uniform, showing what is the settled law of the state, the United States courts will adopt them as the rule for their own decision.[49]

Tenure of Estates; Eminent Domain

On the same general principle, whatever the courts of a state have decided upon as the true interpretation of a statute relating to the nature or tenure of estates, as, one abolishing estates tail, will also be adopted by the courts of the United States.[50] This is likewise true of the various local rules concerning the assessment of property for municipal improvements, the rights of owners of land abutting on city streets, and the appropriation of property for public use under the power of eminent domain. Thus, for instance, when the courts of a state have held that the use of land in a city street for the construction and operation of a street railway operated by horse power is not a new burden, but simply a new mode of enjoying the public easement of passage, and that, therefore, no further compensation can be demanded by the owner of such land, and when those courts have further ruled, in an action brought to prevent the laying of the track, that there was lawful authority under the statutes of the state to lay it, the United States circuit court, on an application to it for a provisional injunction to stop the work of laying the track, will accept and follow these decisions of the state courts.[51] So if, in similar circumstances, the supreme court of the state has held that an abutting landowner cannot enjoin the laying of a track in the street, but that his remedy is in damages, and that a proceeding to enjoin must be brought by the city or by the attorney general, this ruling is bind-

[49] New York Life Ins. Co. v. Allison, 107 Fed. 179, 46 C. C. A. 229, citing Davis v. Mason, 1 Pet. 503, 7 L. Ed. 239; Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168; Suydam v. Williamson, 24 How. 427, 16 L. Ed. 742; Williams v. Kirtland, 13 Wall. 306, 20 L. Ed. 683.

[50] Van Rensselaer v. Kearney, 11 How. 297, 13 L. Ed. 703.

[51] Van Bokelen v. Brooklyn City R. Co., 5 Blatchf. 379, Fed. Cas. No. 16,830.

ing on the federal courts.[52] Again, the decision of the highest state court that the owner of property abutting on a local improvement may proceed by mandamus or injunction to compel a hearing by the body making the assessment, or prevent the approval of the engineer's report until such hearing has been accorded, is conclusive on the Supreme Court of the United States in reviewing a judgment of the state court foreclosing the lien of such assessment.[53] So also a determination of the supreme court of the state that an owner of land abutting on a city street has no easement of light, air, and access as against the public use of the street, or any structure that may be erected thereon to subserve and promote that public use, is conclusive on the federal supreme court, when determining, on writ of error to the state court, whether such abutting owner has been deprived of his property without due process of law by the erection in the street of a viaduct for general public use, under the authority of a statute which makes no provision for compensation to abutting owners.[54]

MORTGAGES, FORECLOSURE, AND REDEMPTION

153. Rules established by the decisions of the highest court of a state concerning the validity and effect of mortgages of real property, their foreclosure, and the right of redemption therefrom, are rules of property and will be adopted and followed by the federal courts, save as to mere matters of practice not affecting the substantial rights of parties, and except where the particular question involved is one of commercial or general law.

As a branch of the law of real property, and one which intimately concerns the foundation and enjoyment of titles, the rules governing mortgages of land, their nature, in-

[52] Lobenstine v. Union El. R. Co., 80 Fed. 9, 25 C. C. A. 304.
[53] Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195.
[54] Sauer v. City of New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

cidents, and validity, their registration and the effect thereof, their assignment and transfer, their foreclosure and the rights of the parties thereunder, and the mortgagor's right of redemption before or after sale, are peculiarly within the rightful authority of each state to settle for itself in accordance with its own notions of justice and convenience. In so far as these matters may be regulated by statute, it is the province of the courts of the state to construe and apply them. In so far as the law remains unwritten, it is for those courts to determine the various questions that may arise. In either case, their decisions are to be regarded as establishing rules of property, and these rules are obligatory upon the federal courts having jurisdiction in the state where the property is situated, and they will be followed without an independent investigation of the principles of law on which they may rest. To illustrate, the federal courts have declared themselves bound to accept and follow the decisions of the state courts upon the following questions: Whether a deed of trust, as now often used, is a valid form of pledging land as security for a debt;[55] whether a mortgage on the property of a mining corporation is valid without the ratification of the stockholders, and whether its validity may be questioned by judgment creditors on this ground;[56] whether a mortgage, to be entitled to record, must truly describe the debt intended to be secured, or whether it is sufficient if the debt is of such a character that it might have been secured by the mortgage had it been truly described;[57] whether a mortgage placed on the record without having been properly acknowledged constitutes a lien as against third persons who have actual knowledge of its record.[58] Again, where a tract of land has been placed under the incumbrance of a mortgage, and different parcels of it are thereafter sold at different times to various purchasers, and a

[55] In re Elletson Co. (D. C.) 174 Fed. 859.

[56] Williams v. Gold Hill Min. Co. (C. C.) 96 Fed. 454.

[57] Townsend v. Todd, 91 U. S. 452, 23 L. Ed. 413.

[58] Cumberland Building & Loan Ass'n v. Sparks, 111 Fed. 647, 49 C. C. A. 510.

foreclosure becomes necessary, the question may arise whether these parcels are all equally and primarily liable to the satisfaction of the mortgage, or whether the owners of them may claim to have their holdings marshaled in order, something after the order of liability of the successive indorsers of a promissory note. In several states, the rule has been settled that, in such a case, the parcels are liable in the inverse order of their alienation; and where this is the case, it constitutes a rule of property, which must be adopted by the federal courts in that state.[59] Such is also the rule in regard to the method and validity of a foreclosure of a mortgage.[60] And where the law of a state, as interpreted by its courts, gives a right of redemption on certain terms to the mortgagor or then owner of the property (and sometimes also to his judgment creditors) for a limited time after the sale made on a statutory foreclosure, it is a rule of property, obligatory on the federal courts sitting in that state, and a decree of foreclosure made by the United States court must contain provision for such a redemption substantially in accordance with the practice in the state courts in corresponding cases.[61] The same remark applies to cases where the equity of redemption may be barred without foreclosure. Thus a state law providing that the right of redemption shall be barred after twenty years, where possession of the mortgaged property is obtained without legal process, with a proviso that the supreme court of the state may allow a redemption after that lapse of time, if there are any peculiar circumstances which, in its opinion, render such redemption equitable, being in affirmation of the general principles on which redemption is granted or refused, will be followed by a federal court sitting in equity.[62]

But it is necessary to discriminate carefully between mat-

[59] Orvis v. Powell, 98 U. S. 176, 25 L. Ed. 238.

[60] Sullivan v. Portland & K. R. Co., 4 Cliff. 212, Fed. Cas. No. 13,596.

[61] Orvis v. Powell, 98 U. S. 176, 25 L. Ed. 238; Jackson & Sharp Co. v. Burlington & L. R. Co. (C. C.) 29 Fed. 474; Brine v. Hartford Fire Ins. Co., 96 U. S. 627, 24 L. Ed. 858.

[62] Dexter v. Arnold, 2 Sumn. 152, Fed. Cas. No. 3,859.

ters which affect the substantial rights of the parties and such as relate only to the details of practice. For example, anything that may increase the amount to be paid on redemption or diminish the surplus proceeds of a sale on foreclosure, affects the rights of the mortgagor and cannot be considered a mere matter of practice. And hence, in regard to the validity and effect of a stipulation in a mortgage, providing for the allowance of an attorney's fee to the complainant in case of foreclosure, and for its payment out of the proceeds of the sale, and in respect to the authority of the court decreeing foreclosure to include in its judgment a fee so stipulated for, the federal courts will be governed by the statutes and judicial decisions of the courts of the state wherein the proceeding for foreclosure is brought. If, by the law of the state, such a stipulation is unlawful and void, it cannot be enforced in a federal court upon the foreclosure of a mortgage on land in that state.[63] And conversely, if the laws of the state recognize an agreement of that kind as valid, the complainant in a federal court will have the same right, in regard to recovering attorneys' fees, as in a court of the state. Again, a state statute taking from the mortgagee the right of possession until after confirmation of the foreclosure sale, and a decision of the supreme court of the state that this law secures to the mortgagor the rents and profits pending foreclosure, constitute a rule governing substantial rights and not mere matters of practice. And therefore a federal court, sitting in that state, has no power to appoint a receiver of the rents and profits on the ground that the security is inadequate.[64] But on the other hand, if the United States courts give substantial effect to the right of redemption secured by a state statute, they are at liberty, in so doing, to adhere to their own modes of proceeding. Thus, in a case

[63] Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501; Bendey v. Townsend, 109 U. S. 665, 3 Sup. Ct. 482, 27 L. Ed. 1065; Gray v. Havemeyer, 53 Fed. 174, 3 C. C. A. 497; Vitrified Paving & Pressed Brick Co. v. Snead & Co. Iron Works, 56 Fed. 64, 5 C. C. A. 418.

[64] Union Mut. Life Ins. Co. v. Union Mills Plaster Co. (C. C.) 37 Fed. 286, 3 L. R. A. 90.

where it appeared that the statute gave the debtor twelve months from the confirmation of the sale in which to redeem, and the practice of the state courts was to report the sale at once for confirmation, but the federal court gave the debtor twelve months from the day of sale, in which to redeem, it being its practice to make the final confirmation and the deed at the same time, that is, after the expiration of the year, it was held that this was a substantial recognition of the right to redeem within twelve months, and a decree of the federal court should not be disturbed on appeal.[65] And so, a rule of the federal court requiring a judgment creditor redeeming from a foreclosure sale to pay the redemption money to the clerk of the court, instead of to the officer holding the execution (as prescribed by the state statute) is proper, as it belongs within the domain of practice and does not affect the substantial right of redemption.[66]

We must also distinguish between local rules of property and general rules of commercial law. For instance, where several notes of the same date but maturing at different times are secured by one and the same mortgage, and are negotiated and transferred to different holders at different times, and the proceeds of foreclosure are insufficient to satisfy all, it is the rule in some states that the notes shall be paid in the order of their maturity, in others, that they shall be satisfied in the order of their assignment, in still others, that they shall share pro rata in the proceeds. But whatever rule is established in the particular state, it will be regarded as a rule of property there, and the federal courts will be constrained to follow it.[67] On the other hand, in respect to the right of a mortgagor of realty to set up, as against an assignee of the mortgage, defenses which would have been available to him if the security had remained in

[65] Allis v. Northwestern Mut. Life Ins. Co., 97 U. S. 144, 24 L. Ed. 1008.

[66] Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648.

[67] New York Security & Trust Co. v. Lombard Inv. Co. (C. C.) 65 Fed. 271.

the hands of the original mortgagee, the debt being evidenced by a negotiable note, the courts of the United States do not consider themselves bound to follow the decisions of the state courts, the question being one of general commercial law. Without regard to local rules, they will follow the rule laid down by the Supreme Court of the United States, that where a mortgage given to secure a negotiable promissory note is transferred, before the maturity of the note, to a bona fide holder for value, and a suit in equity is brought to foreclose the mortgage, no other defenses can be interposed against the mortgage than such as would be allowed in an action at law to recover on the note.[68]

ACKNOWLEDGMENT AND RECORD OF DEEDS

154. Decisions of the highest court of a state construing its statutes as to the acknowledgment and recording of deeds, mortgages, and other such instruments establish rules of property, which are obligatory upon the federal courts when administering the law of that state, saving any questions arising under the constitution or laws of the United States or under the general commercial law.

No detailed explanation of the foregoing rule is deemed necessary. It is a rule long and firmly adhered to by the courts of the United States, and it is their invariable practice, when no federal question is involved nor any question arising under the general mercantile or commercial law, to treat the decisions of the highest court of the state as binding precedents, when concerned with the interpretation or application of the laws of the state in regard to the acknowledgment or registration of conveyances and the various rights or interests to be affected thereby.[69]

[68] Swett v. Stark (C. C.) 31 Fed. 858; Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313; Myers v. Hazzard (C. C.) 50 Fed. 155.

[69] Abraham v. Casey, 179 U. S. 210, 21 Sup. Ct. 88, 45 L. Ed. 156; McKeen v. Delancy, 5 Cranch, 22, 3 L. Ed. 25; Ross v. McLung, 6 Pet. 283, 8 L. Ed. 400; Townsend v. Todd, 91 U. S. 452.

ADVERSE POSSESSION AND COLOR OF TITLE

155. Questions concerning the title to real property, as depending on adverse possession, color of title, and the statute of limitations, are to be determined according to the law of the state in which the land lies; and the decisions of its highest court on these questions are of controlling authority in the federal courts.

When questions of the kind indicated in the foregoing rule have become settled in a given state by the uniform decisions of its court of last resort, or even by a single decision which has stood for a long time unquestioned and has met with general acquiescence, they are considered as closed against further examination or consideration. Titles rest upon those decisions. The people come to rely upon them as definitive expositions of the law by which their dealings are to be governed. In other words, they become rules of property, which even the highest court of the state will not change, except for the strongest imaginable reasons, though it might be disposed to give an entirely different solution to such questions if they had not been so settled. Further, the law which is to govern all such matters is essentially local and is within the exclusive jurisdiction of the particular state. For these reasons the federal courts will not undertake to express an independent opinion on such questions if there are decisions of the highest court of the state applicable to the case at bar. Thus, in a condemnation proceeding in a court of the United States, to acquire for the national government title to land within the limits of a given state, the question whether certain claimants of the fund had title to the land by adverse possession under color of title, depends on the law of the state,

23 L. Ed. 413; Union Pac. R. Co. v. Reed, 80 Fed. 234, 25 C. C. A. 389; Cumberland Building & Loan Ass'n v. Sparks, 111 Fed. 647, 49 C. C. A. 510; Hay v. Alexandria & W. R. Co. (C. C.) 20 Fed. 15.

and is not a question concerning which the federal court can or will form an independent judgment, if the state court has laid down rules covering the circumstances of the particular case.[70] Again, in an action between citizens of different states, involving title to a large tract of unimproved land, where the judgment must depend upon the question whether the acts of the plaintiff performed upon the land (such as ditching, draining, cutting timber, establishing logging camps, and the like) constitute a possession sufficient to found a title, and, if so, whether his occupation of different parts of the land may constitute a possession of the tract as an entirety, the federal court will look to the laws and decisions of the state, and will be absolutely governed by them, as constituting rules of property.[71] So also, where the statute of limitations of a given state, relating to actions for the recovery of land, has been liberally construed and applied by the supreme court of the state, in respect to the adverse possession of settlers which will ripen into a title thereunder, on account of the confusion created by the loose practice of the state in issuing patents for conflicting grants, the decisions of that court, having become a rule of property in the state, will be followed by the federal courts.[72] Again, by analogy to the rule in regard to limitations, federal courts should follow the decisions of a state court as to laches affecting rights to the title or possession of real property in that state.[73] And this is also the rule in regard to state laws relating to compensation for improvements on land, made in good faith by occupying claimants. When settled by judicial decisions in the state, in construction of its statutes, these are rules of property, which the federal courts will recognize and follow.[74]

[70] United States v. One Lot of Land for Bainbridge Post Office (D. C.) 178 Fed. 334.

[71] Santee River Cypress Lumber Co. v. James (C. C.) 50 Fed. 360.

[72] Scott v. Mineral Development Co., 130 Fed. 497, 64 C. C. A. 659.

[73] Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co., 90 Fed. 189, 32 C. C. A. 571.

[74] McClaskey v. Barr (C. C.) 62 Fed. 209.

WILLS AND DESCENT AND DISTRIBUTION OF PROPERTY

156. Though the construction of a particular will by the state courts is not necessarily binding on the federal courts in analogous cases, yet where the uniform decisions of the state courts have settled the legal meaning and legal effect of particular words and phrases, as used in such instruments generally, they become rules of property, which the federal courts are bound to follow.

157. The laws of the state, as fixed by its statutes and judicial decisions, in regard to the descent and distribution of property, the validity of bequests, and the settlement of the estates of deceased persons, are obligatory on the United States courts.

Construction of Wills

The cardinal rule in the construction of testamentary writings is to ascertain and carry out the intention of the testator, if legally possible. And this depends upon the language of the instrument, considered in relation to the context and the surrounding circumstances. Hence the construction judicially placed upon one will is not necessarily a precedent to be followed in the interpretation of another will, even by the same court, unless, indeed, there be such an absolute identity of language and of context as is but seldom encountered. There is, therefore, no reason why the federal courts should be absolutely bound to follow the decision of the state court in a similar or analogous, but not identical, case. On the question, for example, whether words employed in a will which are expressive of a wish or recommendation are sufficient to create a testamentary trust, the decisions of the state court in similar cases may indeed be consulted, but they only afford a guide in applying to the precise question the general rule of giving

effect to the testator's intention.[75] It was, indeed, stated in an early decision of the Supreme Court of the United States that it would not consider itself imperatively bound to follow the decision of a state court construing a will, as it would in the case of a statute, unless the ruling of the state court had been so long acquiesced in as to have become a rule of property.[76] But this statement must be considered as materially modified by a much later decision of that court, which also illustrates the principle that it is proper to defer to and follow the judgment of the state court in order to secure uniformity and to avoid conflicting rulings upon the same rights or interests. A testator in Mississippi had in his will appointed a trustee, to whom he confided the power to "dispose of" all or any portion of the estate that might fall to devisees, and invest the proceeds for their benefit. The Supreme Court of Mississippi, in a case arising under this will, decided that the trustee had power to make partition among the devisees. This precise point, and in a case between the same parties, afterwards came before the Supreme Court of the United States, and that tribunal decided that, in view of the opinion of the state court, it would solve the question in the same way, although the decision of the state court was not announced under such conditions as to make it res judicata. In other words, the decision was followed as a precedent, and not as creating a technical estoppel upon the parties.[77]

But the case is different where repeated decisions of the state courts have uniformly given a certain legal meaning or legal effect to particular words or phrases when used in wills. If, by the course of decisions in the courts of a state, certain language, when so employed, is held to create a certain estate or to confer certain rights, a rule of property is thereby established, and the federal courts will give to such language the same effect to which it is entitled by

[75] Russell v. United States Trust Co. of New York, 127 Fed. 445, affirmed 136 Fed. 758, 69 C. C. A. 410.

[76] Lane v. Vick, 3 How. 464, 11 L. Ed. 681.

[77] Phelps v. Harris, 101 U. S. 370, 25 L. Ed. 855.

the local law. This was ruled, for instance, in a certain case where the question was as to the effect of a devise of land to one "and the heirs of his body" in the face of a statute abolishing estates tail.[78]

Descent and Distribution of Estates

It is the right of every state to determine for itself to whom and by what kinds of instruments property within its borders may pass; and the law on this subject is determined by the statutes of the state and by the decisions of its courts construing the written laws and solving questions left unsettled by the statutes. Hence, for example, questions involving the validity of bequests to unincorporated associations, if brought before the federal courts, must be determined by the law of the state in which the administration lies, as laid down in the decisions of its highest court.[79] And generally speaking, all questions of law which may thus come before the courts of the United States, and which relate to the descent of the property of an intestate, or the distribution of the assets of one leaving a will, or the settlement of an estate of either kind, are to be decided in accordance with the law of the state, of which the best evidence is furnished by the rulings of its highest court, in the absence of a statute explicitly covering the point at issue, or construing or interpreting such a statute.[80] This rule is not modified by the fact that the United States courts have a distinct equity system of their own, which is independent of all state rules and decisions. It is said that where the laws of a state governing the descent of real property, and constituting rules of property, conflict with the practice of the federal courts in equity, the former control; and where there is no conflict, both are in force.[81]

[78] Buford v. Kerr, 90 Fed. 513, 33 C. C. A. 166.

[79] Meade v. Beale, Taney, 339, Fed. Cas. No. 9,371.

[80] McPherson v. Mississippi Valley Trust Co., 122 Fed. 367, 58 C. C. A. 455; Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; McPike v. Wells, 54 Miss. 136; Dodd v. Ghiselin (C. C.) 27 Fed. 405.

[81] Childs v. Ferguson, 181 Fed. 795, 104 C. C. A. 305.

NATURE AND EFFECT OF CONTRACTS

158. The validity and the legal effect of contracts of various kinds (not including negotiable instruments) are matters of local law; and a federal court, administering the law of the state in which it sits, will be governed in such matters, by the decisions of the highest court of the state

The reason for excepting negotiable instruments, in the foregoing rule, is that questions concerning bills and notes are considered to belong to the domain of what is called "general commercial law," as to which the United States courts do not consider themselves bound to follow the rulings of the state courts, but work out their own system of rules and principles. This will appear more fully in a later chapter. As to the remainder of the rule, there is very little doubt or dispute. We may illustrate it by calling attention to those anomalous contracts or transactions between parties, not infrequently coming before the courts, and which cannot be very clearly classified, so that it is a debatable question whether the particular arrangement should be treated as one form of contract or another, the rights and duties of the parties, and perhaps the validity of the contract, depending on the answer to this question. For instance, it is sometimes necessary to determine—and the rights of the parties will vary with the answer—whether the particular contract is to be treated as a lease or as a contract of conditional sale, whether it is a sale of goods or a bailment of them, whether it is a conditional sale or a chattel mortgage. In respect to such questions as these, and in respect to the rights and liabilities of parties as depending on the classification of the contract, and also as to its validity in the form assigned to it, the federal courts administer the law of the state in which they sit, and consequently are under the duty of following the decisions of the highest court of the state, whatever may be their opinion on the point as an abstract question of law, and whatever may have been the decisions of other federal courts,

sitting in other states, and similarly following the local rules.[82] So a decision of the highest court of a state, construing a writing relating to the sale of a vein of coal underlying land in that state, and holding it to be an option and not a contract of sale, establishes a rule of property and will be followed by a federal court in construing another contract relating also to property in that state and identical in terms.[83] This is also the rule in regard to such well-known forms of contracts as that of insurance. In a suit in the federal courts to determine the rights of policy holders and the insurer, the decisions of the highest court of the state are of controlling authority.[84] So as to the question whether a contract is to be governed by the law of one state or of another, which may involve its validity or enforceability. Thus, for instance, a contract of guaranty was dated and was signed by some of the parties at Chicago and was to be performed in Illinois. Afterwards it was signed by a married woman in Connecticut, and was then delivered by her husband in Illinois. The Supreme Court of Connecticut, in insolvency proceedings, held that the contract was, as to the woman, a Connecticut contract, and was invalid under the law of that state for want of capacity to make it. In an action against her on the guaranty, brought in a federal court, this decision was accepted as conclusive and was therefore followed.[85]

TRANSFER AND INCUMBRANCE OF CHATTELS

159. Local rules of property, established by the courts of a state, and regarded as equally obligatory upon the federal courts in that state, may relate to the transfer and incumbrance of personal property as well as of real property.

[82] In re E. M. Newton & Co., 153 Fed. 841, 83 C. C. A. 23; In re Burke (D. C.) 168 Fed. 994; In re Heckathorn (D. C.) 144 Fed. 499; In re Sheets Printing & Mfg. Co. (D. C.) 136 Fed. 989; Pioneer Gold Min. Co. v. Baker (C. C.) 23 Fed. 258.

[83] Fretts v. Shriver (C. C.) 181 Fed. 279.

[84] Polk v. Mutual Reserve Fund Life Ass'n (C. C.) 137 Fed. 273.

[85] First Nat. Bank v. Mitchell (C. C.) 84 Fed. 90.

160. Questions concerning the validity of chattel mortgages, the lien created thereby, and the rights of holders as against other creditors, are questions of local law in each state, as to which the federal courts will follow the settled decisions of the highest court of the state. The same is true in regard to general assignments for the benefit of creditors.

In a leading case in the Supreme Court of the United States on this subject, it was said: "The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several states. But whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein." [86] Questions of this kind may come before the federal courts not only in cases between citizens of different states, but also in cases under the federal statutes, and more particularly the bankruptcy act. Here the entire proceeding is founded on the act of Congress, but it does not follow that every question arising in the case is a "federal question," as to which the court of bankruptcy is independent of state law. On the contrary, in many respects the rights of the bankrupt as against his creditors, or of the creditors as between themselves, are explicitly or impliedly left to be governed by the

[86] Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171. And see, to the same effect, Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425; American Surety Co. v. Worcester Cycle Mfg. Co. (C. C.) 100 Fed. 40; Wilson v. Perrin, 62 Fed. 629, 11 C. C. A. 66; Morse v. Riblet (C. C.) 22 Fed. 501.

local law, the law of the state where the bankrupt resides. And hence, for example, in determining a question as to the validity of a chattel mortgage, a court of bankruptcy will be governed by the settled law of the state in which it was executed.[87] So also, in deciding whether a chattel mortgage executed by the bankrupt was fraudulent on its face, the federal court will follow the decisions of the court of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property.[88] So again, whether and to what extent a chattel mortgage covering after-acquired property is valid is a local question on which the decisions of the state court will be followed by the federal supreme court in determining whether the taking possession of the mortgaged chattels after condition broken amounted to a preference voidable by the mortgagor's trustee in bankruptcy.[89] Questions often arise also upon the validity or effect of such a mortgage when it has not been filed or recorded as the local statute directs. Thus where a claim of priority is filed in a bankruptcy case, based on a chattel mortgage which was withheld from the record for an unreasonable length of time, the validity of the claimant's lien is to be decided in accordance with the local law of the state governing the record of such mortgages, at least where the claim does not fall within the inhibitions of the bankruptcy act.[90] So also, where the rule is settled in a given state that if property covered by an unfiled chattel mortgage passes into the hands of a receiver, the lien is lost and the rights of creditors are the same as if the mortgagor had made an assignment in trust for their benefit, this rule will be regarded as a rule of property, and will be adopted and followed in proceedings in a federal court sitting in that state to administer the assets of an insolvent through a receiver, as against the holder of an unfiled con-

[87] In re First Nat. Bank, 135 Fed. 62, 67 C. C. A. 536; In re Antigo Screen Door Co., 123 Fed. 249, 59 C. C. A. 248; In re Beede (D. C.) 138 Fed. 441.

[88] Dugan v. Beckett, 129 Fed. 56, 63 C. C. A. 498.

[89] Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

[90] In re H. G. Andræ Co. (D. C.) 117 Fed. 561.

ditional contract of sale of goods to the insolvent, and not the general rule of equity, worked out and applied by the federal courts in chancery proceedings, that the possession of a receiver is only that of the court, and adds nothing to the previously existing title of the mortgagee, the receiver holding for the benefit of whomsoever it shall be found to concern.[91] A very similar rule is applied to the determination of questions arising under a general assignment for the benefit of creditors. As to the validity of such an instrument, its character as a general or partial assignment, the effect of preferences given in it, or of conditions imposed by it upon the rights of creditors, the courts of the United States will feel constrained to follow the decisions of the highest court of the state, because these are questions of local law and not of general jurisprudence.[92]

LIENS

161. Questions concerning the existence, incidents, and effect of all kinds of liens, whether common-law or statutory, and whether affecting real or personal property, are governed by the local law of the state, which is to be found not only in its statutes, but also in the decisions of its courts, and which, when thus ascertained, will be followed and applied by the United States courts.

In bankruptcy proceedings, for instance, the existence and effect of liens claimed on the real or personal property of the bankrupt, and the rights of the parties thereunder, must often be determined by the federal courts; and these questions will be decided with reference to the laws of the state where the proceeding is pending and the liens created.[93] But of course the principle is not confined to pro-

[91] Hamilton v. David C. Beggs Co. (D. C.) 179 Fed. 949.

[92] Robinson v. Belt, 187 U. S. 41, 23 Sup. Ct. 16, 47 L. Ed. 65; Zacher v. Fidelity Trust & Safety-Vault Co., 106 Fed. 593, 45 C. C. A. 480.

[93] Eason v. Garrison & Kelly, 36 Tex. Civ. App. 574, 82 S. W. 800.

ceedings of this character, but applies whenever a local question of this kind comes before a federal court for solution. For example, at common law, the lien of a judgment against the owner of a mere equitable interest in lands did not attach to that interest. In some states this rule still prevails; in others it has been changed by statute; in still others it has been abrogated without the aid of a statute; in some the question is one of doubt, the language of the statute being obscure or ambiguous. But whether or not such an interest is bound by the lien of a judgment is a question of local law, and a federal court will follow the decisions of the courts of the state where the land lies.[94] So again, the question whether an attorney has a lien for his services rendered on money recovered as the result of his efforts, is a matter of local law, not to be disposed of on independent views entertained by the federal court.[95] And where a statute creates an attorney's lien on the client's cause of action, and provides for the enforcement thereof on petition, it is not a mere practice act, but creates a right and provides a remedy, and will be controlling on the federal courts sitting in that state.[96] The same principle applies in determining the validity of a mechanic's lien,[97] the possessory lien on a raft of timber given by the law of a particular state,[98] and a lien created by the law of the state upon the private property of a public officer, intrusted with the custody of public money, to secure a balance due from him to the state.[99]

[94] United States v. Eisenbeis (D. C.) 88 Fed. 4.
[95] Cain v. Hockensmith Wheel & Car Co. (C. C.) 157 Fed. 992.
[96] In re Baxter & Co., 154 Fed. 22, 83 C. C. A. 106.
[97] Morgan v. First Nat. Bank of Mannington, 145 Fed. 466, 76 C. C. A. 236.
[98] Knapp, Stout & Co. Company v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921.
[99] Livingston v. Moore, 7 Pet. 469, 8 L. Ed. 751.

LAW OF CORPORATIONS

162. Where no questions arising under the constitution or laws of the United States are involved, decisions of the courts of a state upon the organization, rights, powers, duties, and liabilities of corporations created under its laws, and of stockholders and creditors, are binding precedents to be followed by the federal courts.

In so far as the rights or liabilities of private corporations may be affected by the interstate commerce law, the Sherman anti-trust law, or any other act of Congress, in any particular case, the questions thus presented are of course to be classed as "federal questions," and within the special cognizance of the United States courts, which are not required to follow the decisions of any state court in similar or analogous cases, but vice versa. So also, many very difficult problems have been presented by the taxing laws and the police regulations of various states in their application to private corporations, where the validity of such statutes has been assailed on the ground of their being contrary to some of the protective provisions of the federal constitution. In matters of this kind, the ultimate decision rests with the Supreme Court of the United States, whose decisions must be accepted and followed by all state courts. It is also well settled that any suit by or against a corporation chartered by the national government or organized under the terms of an act of congress (except the national banks) is to be regarded as a controversy arising under the constitution and laws of the United States, of which a federal court may take jurisdiction, either originally or on removal from a state court. Presumably, therefore, all the issues in such a case would be regarded as "federal questions," in such sense that the court would not feel constrained to follow the rulings made in any particular state, but would be free to determine them according to general principles of law. But aside from these special matters, it belongs exclusively to each state to determine for itself all

things concerning the incorporation and organization of private corporations under its own laws, and their powers, rights, duties, and liabilities, and the rights and remedies of stockholders and creditors, and also the conditions on which foreign corporations shall be admitted to do business within its limits and their status and duties when so admitted. These are all matters of purely local law, and when they have been settled by the decisions of the highest court of the state, either as original problems or as the result of construction and interpretation of its statutes, the federal courts are bound to accept those decisions as conclusive and to follow and apply them without independent investigation.[100] For example, when the question is whether, under the constitution and laws of the state, a company is legally organized as a corporation, a decision of the supreme court of the state settling the question in the affirmative will be accepted as conclusive.[101] So of a decision on the question whether a statute authorizing a designated portion of a county to subscribe stock, issue bonds, and levy taxes, in effect created a corporation.[102] So a decision of a state court declaring a railroad to be different in character, location, and object from that authorized by the charter from the state legislature under which it was constructed, though not followed by a judgment or decree, will be regarded as binding on a federal court within the state.[103] Similar authority attaches to the determinations of the state court on the question of what effect shall be given to acts done by local corporations beyond the scope of their statutory powers.[104] And again, the law of a state making shares of stock in a corporation personal property should be enforced

[100] Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 82 Fed. 124, 27 C. C. A. 73.

[101] Secombe v. Milwaukee & St. P. R. Co., 23 Wall. 108, 23 L. Ed. 67; Mooney v. Humphrey (C. C.) 12 Fed. 612; Fitzgerald v. Missouri Pac. R. Co. (C. C.) 45 Fed. 812.

[102] Hancock v. Louisville & N. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. Ed. 755.

[103] Cleveland, P. & A. R. Co. v. Franklin Canal Co., Fed. Cas. No. 2,890.

[104] Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89.

by a federal court sitting in that state, as a part of the law of the state in respect to corporations created by it.[105] And although the corporation laws of a state, in so far as they impose penalties or unusual liabilities, may have no exterritorial effect, yet in cases where it is proper to apply them, they may be enforced by a federal court beyond the particular state, which, in that instance, will ascertain their meaning and effect from the decisions of the highest court of the state which enacted them, rather than the rulings of the courts of the state wherein it sits. Thus, it was held by a federal court sitting in Massachusetts that the rights given to a creditor of a corporation as against a stockholder therein by the laws of Kansas, not being repugnant to the public policy of the United States or to justice or good morals, and not being calculated to injure the United States or its citizens, might be enforced by a federal court of another district (that is, Massachusetts) under the rule of comity, and without regard to the decisions of the courts of Massachusetts. For it was said that "the determinations of the court of a state that a foreign statute is contrary to its public policy are not binding upon a federal court sitting therein." [106]

RIGHTS AND LIABILITIES OF MUNICIPAL CORPORATIONS

163. The rights, powers, and liabilities of the municipal corporations of each state are matters of local law, governed by the constitution and statutes of the state and the decisions of its courts; and on all such questions the federal courts are imperatively bound to follow the rulings of the highest court of the state, when expressive of the settled law of the state, without regard to their independent opinions on the subject or to the general current of authority elsewhere.

[105] Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647.

[106] Dexter v. Edmands (C. C.) 89 Fed. 467.

As municipal corporations are political subdivisions of a state, organized for purposes of local government, and executing, by a delegated authority and within their special spheres, some of the most important functions of sovereignty, it is obviously the peculiar and exclusive right of each state to determine for itself what shall be the measure of the powers confided to, and the liabilities imposed upon, these governmental agencies. These matters are generally regulated by the constitution and laws of the state. But whenever these fail to furnish a rule for the solution of a particular question, or in so far as its answer must depend upon the construction or interpretation of the written law, it belongs to the courts of the state to settle the law of the state. And when the courts of the United States are called upon to administer the law of the state, in matters of this kind, the pertinent decisions of the highest court of the state are not merely persuasive, but they are binding and obligatory precedents. "It is undoubtedly," says the supreme federal court, "a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state." [107] For instance, a decision of the supreme court of a state, that a municipal corporation has a right to take water from a navigable stream, without making compensation to riparian owners below, who are using the flow of the stream for water power, when not inconsistent with any prior decision of that court, must be regarded as expressing the law of the state on the point involved, and the federal courts are imperatively bound to follow it.[108] Again, the question whether a municipal corporation is responsible in damages

[107] Claiborne County v. Brooks, 111 U. S. 410, 4 Sup. Ct. 489, 28 L. Ed. 470. And see City of Defiance v. McGonigale, 150 Fed. 689, 80 C. C. A. 425.

[108] St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497.

for injuries caused by the negligence or fault of its officers, in any stated case, is not a question which a federal court may determine in accordance with general principles of law or in accordance with the general weight or current of authorities elsewhere, except in instances where the particular point has not yet been passed upon by the highest court of the state. It is a question of local law, not of general law; and the federal courts must follow and apply the local law whenever it is clearly made manifest by legislative action or by the decisions of the chief court of the state.[109] This principle is very well illustrated by an important case in the Supreme Court of the United States, in which it was held that if, under the settled law of a given state, a municipal corporation of that state could not be held liable for personal injuries sustained by a citizen by reason of a defect in a sidewalk, then an action could not be maintained against the corporation in the federal court sitting in that state, for such injuries received by a citizen of another state. The plaintiff, being a citizen of Ohio, and having suffered serious injuries on the streets of the city of Detroit, in Michigan, brought suit in the United States Circuit Court in Michigan and recovered heavy damages. This judgment was reversed by the Supreme Court of the United States. The latter court defined the questions before it as follows: First, what is the settled law of Michigan? and second, if it be as claimed, is it binding upon the federal courts? It was said: "The second inquiry must be answered in the affirmative. If it is a matter of local law, that law is obligatory upon the federal courts. It must be conceded that this adjudication [of the Supreme Court of Michigan] as to the liability of a city for injuries caused by a defect in the sidewalks, the repair of which it has both the power and duty to provide for, is not in harmony with the general rule in this country, nor in accord with the views expressed by this court. * * * But even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court

[109] City of Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168; Clark v. Atlantic City (C. C.) 180 Fed. 598.

of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that state. Whatever our views may be as to the reasoning or conclusion of that court is immaterial. It does not change the fact that its decision is the law of the state of Michigan, binding upon all its courts and all its citizens, and all others who may come within the limits of the state. The question presented by it is not one of general commercial law. It is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within that state. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the state, and that law is not what this court might determine, but what the supreme court of the state has determined. A citizen of another state going into Michigan may be entitled, under the federal constitution, to all the privileges and immunities of citizens of that state; but, under that constitution, he can claim no more. He walks the streets and highways in that state entitled to the same rights and protection as, but none other than, those accorded by its laws to its own citizens." [110]

DOMESTIC RELATIONS

164. The decisions of the state courts on questions arising out of the law of persons, in the various domestic relations, are authoritative evidence of the local law, and as such they will be followed by the federal courts sitting in the state.

The domestic relations generally, and the mutual rights and duties of husband and wife, parent and child, guardian and ward, and master and servant, are matters of local con-

[110] City of Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260.

cern, the regulation and control of which have been reserved to the several states, and in all legal questions arising out of or concerning these relations, the federal courts will follow and be bound by the decisions of the highest court of the state.[111] Thus, decisions of the state courts on the law of husband and wife, settling such points as what constitutes a marriage, the incidents of the marital status, and the like, will be accepted as conclusive by the courts of the United States.[112] So also on the application of a citizen and resident of a foreign country for a writ of habeas corpus, to have awarded to him the custody of his child, as against its mother and grandmother, who are citizens of New York, the federal court in that state will be governed in its decision by the law of New York as determined by its statutes and judicial decisions.[113]

INTEREST AND USURY

165. The federal courts in any state are bound to accept and follow the decisions of its highest courts construing the statutes which relate to interest and usury, or deciding similar points not covered by the written law.

The rate of interest on money, the cases in which it shall be given by law, the circumstances under which an agreement to pay it may be implied, the penalties for usury, its effect on contracts and other instruments, and the conditions on which transactions tainted with usury may be avoided, are all matters of local concern and local regulation. And in so far as questions of this kind have been settled by the decisions of the highest court of a state, expository of its statutes or supplementary thereto, such decisions are imperatively binding on the courts of the United States when administering and applying the law of the

[111] Kerlin v. Chicago, P. & St. L. R. Co. (C. C.) 50 Fed. 185.
[112] Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298.
[113] In re Barry (C. C.) 42 Fed. 113.

state.[114] Thus, for example, if the decisions of the state court refuse to allow interest on overdue interest coupons of railroad-aid bonds, such interest cannot be recovered in the federal courts, for the question of allowing interest on instruments which do not draw interest either by their own terms or under a statute, is one of local law.[115] So if the supreme court of a state has decided that mortgages given to building and loan associations are not excepted from the usury laws, but are subject in this respect to the same rule as other mortgages, this doctrine must be followed by the United States courts.[116] So the Minnesota doctrine, that one suing to cancel a Minnesota contract for usury need not offer to repay the money loaned, will be applied in the federal court, where the suit was commenced in the state court and removed on the ground of diverse citizenship.[117] But it has been held that a state statute which authorizes a borrower to obtain a cancellation of securities without payment, on the ground of usury, cannot bind a court of equity out of the state, in dealing with a bond and mortgage made and delivered within the state.[118]

[114] Bond v. John V. Farwell Co., 172 Fed. 58, 96 C. C. A. 546.
[115] Bolles v. Town of Amboy (C. C.) 45 Fed. 168.
[116] McIlwaine v. Iseley (C. C.) 96 Fed. 62.
[117] Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474.
[118] Matthews v. Warner (C. C.) 6 Fed. 461.

CHAPTER XIV

SAME; VALIDITY AND CONSTRUCTION OF STATE CONSTITUTIONS AND STATUTES

166. General Rule.
167. Requisites of Decision to be Followed.
168–170. Federal Questions Excluded.
171. Construction of State Constitution.
172. Enactment and Repeal of Statutes.
173. Constitutionality of Statutes.
174. Statutory Construction in General.
175. Statute of Limitations.
176. Exemption Laws.
177. Revenue and Tax Laws.
178. Employers' Liability Laws.

GENERAL RULE

166. The federal courts uniformly adopt and follow the construction of the constitution and statutes of a state, announced by its highest judicial tribunal, and also the rulings of the latter as to the validity, under the state constitution, of state statutes and municipal ordinances, in all cases which involve no question of federal law or of rights claimed under the constitution and laws of the United States.

In General

Since the meaning and effect of any clause or provision in the constitution of a state, either when it is to be applied directly to the subject-matter of the action or when it is used as the criterion to test the validity of a statute of the state or an ordinance of one of its municipalities, is a matter peculiarly and exclusively within the province of the courts of the state, with the final word resting with its highest appellate tribunal, the courts of the United States should always accept and follow the decisions of that tribunal on questions of this kind, no matter what opinions they might themselves entertain as the result of an independent consideration of the subject. This is more than a

matter of judicial comity; it is a matter of positive obligation. And it has always been recognized as such by the federal courts, which have held, in a long and uniform course of decisions, that where the question at issue concerns only the construction or effect of any provision of the state constitution or a state statute (that is, excluding federal questions and questions of general law), and the question has been authoritatively decided by the court of last resort in the state, they will regard themselves as bound to adopt and apply the doctrine so laid down.[1] And so great is the respect paid to the construction of state statutes by the court of last resort in the state that the Supreme Court of the United States, even in a case where it is free to exercise an independent judgment, will lean towards the decision of the state court, and will adopt and follow it if there is any reasonable doubt on the question.[2]

Different Interpretations in Different States

It is no hindrance to the application of this rule that the courts of different states may have placed widely varying interpretations upon the same statute, which is in force in both states, or upon some particular part or clause of it.

[1] Gatewood v. North Carolina, 203 U. S. 531, 27 Sup. Ct. 167, 51 L. Ed. 305; Wicomico County v. Bancroft, 203 U. S. 112, 27 Sup. Ct. 21, 51 L. Ed. 112; Yazoo & M. V. R. Co. v. Adams, 181 U. S. 580, 21 Sup. Ct. 729, 45 L. Ed. 1011; Tullis v. Lake Erie & W. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Cornell University v. Fiske, 136 U. S. 152. 10 Sup. Ct. 775, 34 L. Ed. 427; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; South Branch Lumber Co. v. Ott, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136; Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Converse v. Mears (C. C.) 162 Fed. 767; Hager v. American Nat. Bank, 159 Fed. 396, 86 C. C. A. 334; Lyman v. Hilliard, 154 Fed. 339, 83 C. C. A. 117; Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; National Bank of Oxford v. Whitman (C. C.) 76 Fed. 697; Kibbe v. Stevenson Iron Min. Co., 136 Fed. 147, 69 C. C. A. 145; City of Beatrice v. Edminson, 117 Fed. 427, 54 C. C. A. 601; McCain v. City of Des Moines (C. C.) 84 Fed. 726; Louisville & N. R. Co. v. Central Stockyards Co., 97 S. W. 778, 30 Ky. Law Rep. 18.

[2] Yazoo & M. V. R. Co. v. Adams, 181 U. S. 580, 21 Sup. Ct. 729, 45 L. Ed. 1011.

The result may be that the different federal courts will apply different rules to the solution of the same question, according to the state in which they sit, and that the federal supreme court may decide identical cases differently, according as the controversy under review originated in one state or another. But in each case it is the law of the particular state which is to be applied, and the federal decisions must be brought into uniformity with the decisions of that state, whatever views may prevail elsewhere. As remarked by the United States Supreme Court, "the fact that similar statutes are allowed different effects in different states is immaterial." [3] And again: "The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law, in effect, becomes by the interpretations, so far as it is a rule for our action, a different law in one state from what it is in the other." [4]

Absence of State Decisions

If the highest court of the state has not yet given its opinion upon any particular question of constitutional or statutory construction, a federal court, when confronted with the necessity of deciding the question, must of course do so in accordance with its own best judgment. And after it has made such a decision, it will continue to adhere to it and follow it, on the principle of stare decisis, unless overruled by the federal supreme court, until it receives authentic evidence of a different interpretation of the constitution or statute by the highest court of the state.[5] But since it is the peculiar province of the chief court of a state to determine the meaning of the statutes of that state, a federal court, in advance of such determination, will hesitate seriously to place upon a state statute any construction which would bring it into conflict with the constitution or

[3] Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341.

[4] Christy v. Pridgeon, 4 Wall. 196, 18 L. Ed. 322.

[5] Richardson v. Curtis, 3 Blatchf. 385, Fed. Cas. No. 11,781.

laws of the United States and so render it void.[6] It is also held, and we think with much propriety, that when the Supreme Court of the United States has considered and has maturely adopted a construction of a state statute, which, at the time, is the settled construction of it by the courts of the state, and afterwards the state court gives a different construction to the same statute, it is proper for a lower federal court to hold the decision of the federal supreme court binding upon it, and not that of the state court, until the question shall be again reviewed by the highest tribunal of the federal system.[7]

Exception as to Remedial Statutes

In a single decision of the United States Supreme Court in 1869, it was held that, although that court would generally follow the decisions of the highest court of a state upon the construction of statutes of the state, where settled rules of property had been established under them, yet, in the construction of statutes of a different character,—such as those prescribing the remedies of creditors,—this rule would not be applied. In such cases, it was said, the court may follow its own judgment; and this was equally true whether the cause was brought up for review from a United States court or from a state court.[8] But there was a strong dissent in this case by Chief Justice Chase and Justice Miller, and, so far as we are advised, it has not been followed or approved in later decisions.

Exception as to Questions of General Law and Law of Contracts

It must not be forgotten that it is only upon questions of constitutional or statutory construction that the United States courts are bound by the decisions of the state courts, and not upon questions of general law, though the latter may arise upon the application of a statute to the particular case. Thus, for instance, if the question of the validity or invalidity of a given contract depends directly and en-

[6] Davenport Nat. Bank v. Mittelbuscher (C. C.) 15 Fed. 225.
[7] Neal's Lessee v. Green, 1 McLean, 18, Fed. Cas. No. 10,065.
[8] Butz v. City of Muscatine, 8 Wall. 575, 19 L. Ed. 490.

tirely upon a statute of the state, the construction of that statute by the state court will furnish a controlling rule of decision for the federal court.[9] But on the other hand, where, for instance in a suit to restrain a city from constructing and operating a system of municipal water works, the rights of the complainant were acquired under a contract with the city, and not by virtue of any constitutional or statutory provision, a decision of the state court upon the authority of the city to engage in the enterprise mentioned is not of any controlling authority in the federal court.[10] Again, there may be a difference between the question how to interpret a given statute and the question of its effect upon a given contract, the latter depending on the terms of the contract. In such cases, the former question is one of local law, the other one of general law. Hence, where it becomes necessary for a federal court to apply a state statute to a particular contract, it will read and interpret the statute in the same light in which it has been construed by the highest court of the state, but upon the further question whether the contract is in violation of the law as thus construed, depending on a consideration of all its provisions, the federal court is entitled to form and express an independent judgment.[11] So again, the competency of a state, through its legislature, to make an alleged contract, and the meaning and validity of such contract, are matters which the Supreme Court of the United States, on writ of error to a state court, must determine for itself by an independent judgment, as an exception to the general rule that it will accept the decision of the state supreme court on the construction of the state constitution.[12] For another illustration of this principle, it is said that the relations between a building and loan association and its stockholders, as

[9] Clarksburg Electric Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

[10] City of Sioux Falls v. Farmers' Loan & Trust Co., 136 Fed. 721, 69 C. C. A. 373.

[11] City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

[12] Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162.

such, are the same as between other business corporations and their stockholders, and their respective rights and obligations under the contract are governed by the general law, unless modified by statute. As to matters arising out of such relations, the decisions of the courts of the state are not binding upon the federal courts. But when a stockholder becomes also a borrower from the association, his contract in that capacity is governed by the local law, since it depends entirely on the statute, and upon the question of his rights and liabilities thereunder the state decisions are controlling in the federal courts.[13] And of course the principle is not restricted to matters of contract, but extends also to questions of general jurisprudence. Thus, for example, a rule that contributory negligence shall not be a complete bar to a statutory action for negligence is binding on a federal court, when such rule grows out of the language of the statute and the construction of that language by the supreme court of the state, but not otherwise.[14]

REQUISITES OF DECISION TO BE FOLLOWED

167. In order that a decision upon the construction of a state constitution or statute should be of controlling authority in the federal courts, it must have been rendered by the highest court of the state, before the making of the contract or the vesting of the rights in suit, and it must be fairly upon the point at issue, concerned directly and solely with the question of interpretation, and a true judicial decision, as distinguished from an obiter dictum.

Although a particular action in the state courts may be founded on a statute of the state, so that the courts, in determining it, are engaged in the administration of the statute, yet it does not follow that their decision is imperatively

[13] Coltrane v. Blake, 113 Fed. 785, 51 C. C. A. 457.

[14] Byrne v. Kansas City, Ft. S. & M. R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693.

binding upon the federal courts. This result follows only when the adjudication depended upon the construction or interpretation of the law with reference to its meaning and effect.[15] And again, where the particular provision of the statute under construction has nothing essentially local or peculiar in it, but is merely declaratory or affirmative of the common law or of the general law of the subject, it is said that the federal courts are not bound to follow a decision of the highest court of the state upon the construction of such provision, when not in accord with their own views.[16] But it is not perfectly clear that this last rule should be admitted as correct. For it appears to lose sight of the principle that, whatever construction the state court may put upon the state statute, that construction becomes a part of the statute as much as if written into it by the legislature; and it is binding on a federal court, not because it may accord with the generally accepted doctrine on the point in question, but because, whether it so accords or not, it obtains and retains the force of law. It is also to be observed that, in the construction of a state statute, the federal court will be guided if not governed by the construction of similar statutes in pari materia by the highest court of the state.[17] And where a decision of the court of last resort in the state places a limitation upon the scope of a state statute, whether it is based strictly upon a construction of the language of the statute or upon considerations of public policy, it is in either case to be regarded as an interpretation of the statute which must be followed by the federal courts.[18] So also, the principle of analogy may require the federal court to decide in a particular way, even in the absence of a decision of the state court squarely in point. Thus, in one case, such a court refused to adjudge a state statute invalid, notwithstanding there was something on its face which appeared to make it irreconcilable with the

[15] New England Mortgage Security Co. v. Gay (C. C.) 33 Fed. 636; Lyman v. Hilliard, 154 Fed. 339, 83 C. C. A. 117.

[16] Mutual Life Ins. Co. of New York v. Lane (C. C.) 151 Fed. 276.

[17] Debitulia v. Lehigh & Wilkesbarre Coal Co. (C. C.) 174 Fed. 886.

[18] Zeiger v. Pennsylvania R. Co., 158 Fed. 809, 86 C. C. A. 69.

provisions of the state constitution, for the reason that the state courts had never pronounced against its validity though it had been in force for thirty years, and for the further reason that the construction placed upon those provisions of the constitution by the supreme court of the state, in regard to other and different statutes, would make in favor of the constitutionality of the statute.[19]

The controlling authority of a decision rendered by the state court of last resort, even upon a question of local constitutional or statutory law, is strictly limited to the precise question adjudicated.[20] It does not extend to any matters incidentally considered, or which, though noticed by the court, were unnecessary to the determination of the case before it, nor to principles of law deducible merely by inference or analogy from the court's decision. Nor is the federal court, in such cases, at all bound to conform its decision to extra-judicial expressions of opinion by the state court or to views expressed by it merely in the way of obiter dicta.[21]

Furthermore, it is always proper to examine the opinion of the state court critically, for the purpose of ascertaining whether it does in reality decide the particular point which is before the federal court for adjudication. But when this is determined, it is not considered within the province of the federal court to reject or disparage the authority of the decision of the state court on the ground that it was given improvidently, or mistakenly, or without due consideration of the subject. It is true that this has sometimes been done. In a case in one of the federal circuit courts in 1894, a decision of a state supreme court, sustaining the validity of a statute relating to certain county bonds, was held not to be binding on the federal court in a suit on other bonds of the same series, because it appeared that a controlling provision of the state constitution had not been called to the

[19] Pegram v. American Alkali Co. (C. C.) 122 Fed. 1000, affirmed Brown v. Pegram, 125 Fed. 577, 60 C. C. A. 383.

[20] Southern Ry. Co. v. Simpson, 131 Fed. 705, 65 C. C. A. 563.

[21] In re Sullivan, 148 Fed. 815, 78 C. C. A. 505; Matz v. Chicago & A. R. Co. (C. C.) 85 Fed. 180.

attention of the state court, and that its decision was based on other grounds.[22] But the Supreme Court of the United States fully sustains the principle we have stated above. In a case in that court, the question was as to the construction of certain parts of the constitution and laws of Oregon, and it appeared that the supreme court of that state had twice decided the particular point. The supreme federal court refused to consider a criticism of these decisions. It was said: "It is not our province to question such construction. Being a construction by the highest court of the state of its constitution and laws, we should accept it. It is said, however, that the cases just cited were decided without having been fully argued, and without mature consideration of this question, upon the mistaken assumption that it had been previously decided in the affirmative by the supreme court of the state, and therefore they have not become a rule of property in the state and are not binding upon this court. We are not impressed with this contention. Such argument might with propriety be addressed to the supreme court of the state, but it is without favor here. We are bound to presume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment thereon." [23] In another case, a taxpayer in the state of Pennsylvania brought an action in a federal court to test the constitutionality of a statute of that state which increased the salaries of the state judges. Before the determination of this case, the supreme court of the state rendered a decision sustaining the validity of the act. There was no doubt that the latter court had jurisdiction of the subject-matter and of the parties to the suit before it. But its judgment was rendered by a single justice, as constituting the court, all the other justices having declined to take part in the case on the ground that they believed themselves to be disqualified by reason of interest. But the federal court held that it could not undertake to review the decision of the state court, or reject its au-

[22] Quaker City Nat. Bank v. Nolan County (C. C.) 59 Fed. 660.
[23] Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843.

thority, on this ground, and that it was bound to conform its own decision thereto.[24]

Reference should also be made in this connection to the well-known rule that when a statute of one state is copied and adopted into the legislation of another state, there is presumed to be adopted with it the settled judicial construction which it had previously received in the state of its origin. Where this is the case, a federal court sitting in the state which has adopted the statute will naturally look first to the decisions of the highest court of that state for an authoritative explanation of any obscure or ambiguous provisions of the statute. But in the absence of such decisions, it will consult, and will pay great deference to, adjudications upon the meaning of the statute made in the state of its origin, just as the local state courts would do. But it is a part of the rule that decisions made in the state from which the statute was drawn are of imperative force only when made before the adoption of the statute, not afterwards. And this principle applies equally to the federal courts as to the state courts. Thus, the whole of the territory which now constitutes the District of Columbia lies within the original exterior boundaries of the state of Maryland; and at the time of the cession of this territory to the United States, Congress provided that the laws of Maryland, then in force, should be extended over the District and continue in effect so far as applicable and until otherwise changed. But decisions of the courts of Maryland rendered since the date of the cession, giving a construction to the statutes of that state different from that which prevailed at the time of the cession, cannot control their construction by the courts of the United States as affecting property within the District.[25]

It is necessary also to consider the case where the highest court of the state has not adhered consistently to a decision once made in regard to the construction of a statute of the state, but has placed different interpretations upon

[24] Henry F. Mitchell Co. v. Matthues (C. C.) 134 Fed. 493.

[25] Morris v. United States, 174 U. S. 196, 19 Sup. Ct. 649, 43 L. Ed. 946.

it at different times. There is a special rule, presently to be noticed, which is applicable where the contract rights or other interests in litigation in the federal court vested or accrued prior to the change of opinion by the state court. But aside from this special case, it is the duty of the federal court to adopt and follow the latest of several conflicting decisions of the state court, as presumably expressive of its final and settled opinion.[26]

But where titles have vested, property been acquired, contracts entered into, or investments made, under a state statute and in accordance with and reliance on the construction which it had then received at the hands of the state court, or on the strength of a decision of the state court sustaining the validity of the statute, and such rights or interests are involved in litigation in the federal courts, the latter courts are not bound to follow later adjudications of the state courts putting a different construction on the statute or pronouncing it invalid. They may lean to an agreement with the state court in a doubtful case, but will not change front with the state court where the result would be the destruction of rights or titles acquired in good faith and in accordance with the law as it was understood to be settled at the time.[27] But this rule has no application where the later decision of the state court was rendered under an amendment to the statute radically departing from the previous legislation of the state, as this is practically the case of a new statute receiving its first construction from the state court, which of course is obligatory on the federal court.[28] Nor is the case quite the same where no judgment of the state court has been pronounced prior to the institution of suit in the federal court. Here, and particularly with reference to a decision upon the constitutional

[26] Gay v. Hudson River Electric Power Co. (C. C.) 178 Fed. 499; Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261.

[27] German Sav. Bank v. Franklin County, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; Louisville & N. R. Co. v. Gaines (C. C.) 3 Fed. 266; Adelbert College of Western Reserve University v. Wabash R. Co., 171 Fed. 805, 96 C. C. A. 465.

[28] Jones v. Great Southern Fireproof Hotel Co. (C. C.) 79 Fed. 477.

validity of a statute, a ruling of the state court is generally to be accepted as determinative if pronounced before final disposition of the action in the United States court. Thus, where an action was brought in a federal court to test the validity of a state statute, and before the determination of a motion to dismiss the bill, the supreme court of the state decided that the act was constitutional, this decision was held to be binding on the federal court.[29] So again, when a United States circuit court of appeals bases its judgment on a state statute, and, pending an appeal to the Supreme Court of the United States, the court of last resort in the state declares the statute void as being in conflict with the state constitution, this latter ruling will be held binding on the federal supreme court on the consideration of the appeal.[30]

FEDERAL QUESTIONS EXCLUDED

168. If the construction of a state constitution or statute, as settled by the courts of the state, conflicts with or impairs the efficacy of some provision of the constitution or a law of the United States, the federal courts will not be bound to follow it.

169. Where the validity of a state statute is assailed on the ground of its being in conflict with the federal constitution or an act of Congress, a decision of the state court, whether sustaining or overthrowing the statute, will not be binding on the federal courts.

170. But where the validity of the statute, as tested by the federal constitution and laws, depends on its being construed in one way or another, the courts of the United States will accept as authoritative the interpretation placed upon it by the highest court of the state.

[29] Henry F. Mitchell Co. v. Matthues (C. C.) 134 Fed. 493.
[30] Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746.

As to the first of the foregoing group of rules, it constitutes a well recognized exception to the general principle that the courts of the United States will follow the courts of a state in the construction and interpretation of its written laws. According to numerous and settled authorities, they will not feel themselves bound to do so when the laws of the state are in conflict with, or impair the efficacy of, any provision of the federal constitution or an act of Congress or a treaty of the United States.[31] This happens, for example, when the legislation of a state undertakes to invade the domain peculiarly set apart for the regulation and control of the national government, or the jurisdiction and powers of the national courts as fixed by the acts of Congress. Thus, the right of set-off is a matter of local legislation ordinarily, and one upon which the federal courts will follow the rules established by the tribunals of the state. But the federal courts have a separate equity system of their own, in no way dependent on the laws of the states, and the matter of set-off, as it is enforced in equity, is not governed by the state statutes nor by their interpretation by the state courts.[32] So in regard to the admiralty and maritime jurisdiction. This cannot be regulated by state laws or state decisions, though there are many provisions as to boats and vessels which the legislature of a state may lawfully make. Thus, it has been held that a state law giving a lien to contractors and persons furnishing labor and materials for the construction of vessels relates to contracts which are not properly described as "maritime," and therefore its interpretation by the highest court of the state will be accepted as binding on the federal courts.[33] Again, it is a settled principle of

[31] Stutsman County v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018; Olcott v. Supervisors of Fond du Lac County, 16 Wall. 678, 21 L. Ed. 382; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520; Morenci Copper Co. v. Freer (C. C.) 127 Fed. 199; Central Trust Co. v. Citizens' St. Ry. Co. (C. C.) 82 Fed. 1; Liebman v. City and County of San Francisco (C. C.) 24 Fed. 705; Cheatham v. Evans, 160 Fed. 802, 87 C. C. A. 576.

[32] Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157.

[33] The Winnebago, 141 Fed. 945, 73 C. C. A. 295.

constitutional law that it is not in the power of a state, by any enactment of its legislature, to abridge or curtail the jurisdiction of the United States courts as vested in them by the federal constitution and laws. Hence if a state statute prohibiting the maintenance of a certain class of actions should be construed as forbidding the institution of such a suit in any court, including the federal courts, the latter courts are not bound to accept or acquiesce in this construction, but may take jurisdiction notwithstanding it.[84]

In the next place, when the constitutional validity of a state statute is assailed in the courts on the ground that it conflicts with some provision of the state constitution, this is peculiarly a matter for the decision of the state courts; and, as will be more fully shown in a later section of this chapter, their judgment will not be questioned by the federal courts, but will be accepted as decisive. But it happens very frequently that, in addition to objections founded on the state constitution, arguments against the validity of the statute are based on its supposed repugnance to one or more of the provisions of the Constitution of the United States, as, that it impairs the obligation of contracts, that it denies the equal protection of the laws, or that it deprives the citizen of his property without due process of law, or constitutes an unlawful attempt to regulate interstate commerce. Now questions of the latter class are peculiarly matters of federal cognizance, as to which the courts of the United States cannot be precluded from forming their own judgment by any previous rulings of any other courts. Hence it is entirely immaterial whether a previously rendered decision of the state court has sustained the statute, as against objections to it under the federal constitution or laws, or has adjudged it invalid. In either case, the courts of the United States, when the question is properly presented to them, will exercise their own independent judgment; and while an able and well-reasoned opinion by a state court may possess great value as a per-

[84] Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co., 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873.

suasive argument for or against the validity of the statute, it is not binding as a precedent.[35]

But the construction of a statute may be an altogether different matter from determining its validity, though the latter may depend on the former. If the act is obscure or ambiguous, or is fairly susceptible of bearing different meanings, it is evident that its interpretation must first be fixed and settled, and then its validity considered in the light of the meaning thus placed upon it. The function of construing a state statute belongs to the state courts; that of passing upon its validity (as tested by the federal constitution and laws) to the federal courts. And when the state courts have already performed their function in this respect, the federal courts will not review or revise their action. Thus we are prepared to understand the full force of the rule now firmly established by the Supreme Court of the United States, that when it is called upon to determine the validity of a state statute under the federal constitution, as, for instance, on a writ of error to a state court, and the question depends on the interpretation of the statute, a previous decision of the highest court of the state, construing the statute, will be accepted as definitive and conclusive.[36]

CONSTRUCTION OF STATE CONSTITUTION

171. The construction placed upon any clause or provision of the constitution of a state, by the highest court of that state, will be accepted as binding and conclusive by the federal courts, save only in so far as questions of federal law may be involved.

When the court of last resort in a state has maturely and deliberately placed its interpretation upon any particular

[35] Morenci Copper Co. v. Freer (C. C.) 127 Fed. 199.

[36] Smiley v. Kansas, 196 U. S. 447, 25 Sup. Ct. 289, 49 L. Ed. 546; W. W. Cargill Co. v. Minnesota ex rel. Railroad & W. Commission, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; Gatewood v. North Carolina, 203 U. S. 531, 27 Sup. Ct. 167, 51 L. Ed. 305.

part or clause of the state constitution, as a matter in judgment in a case before it, the rule is well settled that this interpretation will be accepted by the United States courts as definitive and conclusive and will be followed by them, except in so far as questions may be involved which arise under the constitution or laws of the Union.[37] It matters not that the federal courts have already reached entirely different conclusions in construing language of a similar or identical import in the federal constitution or laws. The final decision as to the meaning of the state constitution rests with the state courts. Thus, where the constitution of a state contains a clause substantially identical in terms with a clause in the interstate commerce act of Congress, but the construction put upon it by the highest court of the state gives it a different meaning from that settled on as its meaning in the federal statute, the Supreme Court of the United States will consider itself bound by the decision of the state court, when determining a case governed by the state constitution.[38] So the decision of the supreme court of a state, to the effect that a provision of the state constitution respecting the enactment of statutes is mandatory, must be followed on that question by a federal court, irrespective of the rule adopted by the federal courts with reference to the passage of federal statutes.[39] Of course this rule finds its most frequent application in cases where a state statute is brought to the test of conformity with the state constitution, and the question is as to the meaning or applicability of some provision of the latter instrument. But it also has an important, though more limited, field in respect to other questions. Thus, for instance, on the question of the date when the constitution or some

[37] Hunter v. City of Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151; Elmwood Tp. v. Marcy, 92 U. S. 289, 23 L. Ed. 710; George A. Shaw & Co. v. Cleveland, C., C. & St. L. Ry. Co., 173 Fed. 746, 97 C. C. A. 520; Western Union Tel. Co. v. Julian (C. C.) 169 Fed. 166; In re Krug (C. C.) 79 Fed. 308.

[38] Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298.

[39] Board of Com'rs of Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642.

amendment to it became operative as law, the federal courts will accept and follow the decision of the highest court of the state.[40] So, on the question whether a given provision of the state constitution was self-executing, or required the aid of a statute to give it direction and effect, the United States courts will not attempt an independent judgment if the court of last resort in the state has already pronounced upon it.[41] Similarly, a decision of the highest court of the state, construing a provision of the state constitution limiting the power of counties and other municipal corporations as to the creation of debts, is binding on the federal courts.[42] And so, the Supreme Court of the United States has declared that it would accept as conclusive the decision of the supreme court of a state that the removal of an attorney without formal legal process was not in violation of the constitution of the state, at least where such judgment was not in conflict with any prior decision of its own.[43]

ENACTMENT AND REPEAL OF STATUTES

172. Upon the question whether a state statute was duly enacted in accordance with the requirements of the state constitution, and also upon the question whether a given statute has been repealed or still continues in force, the decision of the highest court of the state is binding and conclusive upon the federal courts.

The constitutions of the states generally contain mandatory provisions prescribing the forms and procedure to be adopted by the legislative body in the process of enacting statutes, the due observance of which may be essential to the validity of the statute. It is the peculiar province of the courts of the state to decide in any given

[40] Wade v. Walnut, 105 U. S. 1, 26 L. Ed. 1027.
[41] United States v. Stanford (C. C.) 69 Fed. 25.
[42] Wade v. Travis County, 81 Fed. 742, 26 C. C. A. 589.
[43] Randall v. Brigham, 7 Wall. 523, 19 L. Ed. 285.

case whether or not a statute has been passed by the legislature in a manner duly complying with these requirements of the constitution, involving, as the inquiry necessarily does, a construction of the constitution and, in some cases, a scrutiny of the doings of the legislature. When the highest court of the state has given its judgment on a point of this kind, it will not be reviewed by the courts of the United States, but the decision will be accepted by them as binding and conclusive.[44] In some of the states, the rule prevails that an engrossed act of the legislature, duly approved, signed, and filed, is conclusive evidence of its contents, and cannot be contradicted by any evidence whatever. When the courts of the state have established this rule by their decisions, it will be accepted, so far as concerns the legislation of that state, by the federal courts and applied by them whenever called upon to decide a similar question.[45] On the other hand, it is the recognized rule in some of the states that the due authentication and enrollment of a statute afford only prima facie evidence of its passage; that the journals of the legislature may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution; and that if the entries in the journals explicitly and unequivocally contradict the evidence furnished by the enrolled bill, such entries will control. Such a rule is also considered imperatively binding on the federal courts when administering the law of the state where it prevails, because it relates to the construction of constitutional and statutory provisions of the state law.[46] Again, if the decisions of the supreme court of a state establish the rule that an act of the legislature of that state is not valid unless the legislative journals show that it was passed by a majority of all the members elected in each house of the legislature, this rule will be held obligatory on the United

[44] Atlantic & Gulf R. Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Crowther v. Fidelity Insurance, Trust & Safe-Deposit Co., 85 Fed. 41, 29 C. C. A. 1.

[45] United States v. Andem (D. C.) 158 Fed. 996.

[46] Chicago, B. & Q. R. Co. v. Smyth (C. C.) 103 Fed. 376.

States courts in all cases originating in that state.[47] In further illustration of this general principle, it may be noted that an amendatory state statute will not be declared invalid by the Supreme Court of the United States, on the ground that some of its provisions are not within the scope of its title, where the title contains a reference to the statute amended, and where this, under the decisions of the courts of the state, is sufficient to sustain its validity.[48]

So also as to the repeal of statutes. It often becomes a question whether or not a given statute was intended to be repealed by a later act of a more general character and covering the same subject-matter, or whether a repeal by implication is to be deduced from the terms of a subsequent statute not explicitly referring to the earlier law, or whether a statute previously in force but omitted from a subsequent general revision, compilation, or codification of the laws of the state, continues effective or is to be taken as repealed. On any question of this kind, the final and authoritative decision rests with the highest court of the particular state; and when it has adjudicated the point, the federal courts will be bound to accept and follow its decision, entirely without regard to the fact that they would have reached an opposite conclusion if deciding the case according to their own judgment, or if deciding a similar question with regard to the statutes of the United States.[49]

CONSTITUTIONALITY OF STATUTES

173. Where the validity of a state statute is questioned only on the ground of its being in violation of the provisions of the constitution of the state (excluding questions as to its conflict with the constitu-

[47] Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154.

[48] Knights Templars & M. L. Indemnity Co. v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139.

[49] Ughbanks v. Armstrong, 208 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582; Pelk v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Bailey v. Magwire, 22 Wall. 215, 22 L. Ed. 850; Black v. Elkhorn Min. Co. (C. C.) 47 Fed. 600.

tion or laws of the United States), a decision of the highest court of the state, whether it sustains the statute or holds it to be unconstitutional, will be accepted as absolutely final and conclusive by all the courts of the United States, and they will not review or re-examine the question.

The constitutional validity of a state statute may be assailed on the ground that it violates some provision of the federal constitution or of an act of Congress, or on the ground that it is in conflict with some provision of the constitution of the state, or on both such grounds at the same time. So far as regards the question of its conformity to the constitution and laws of the Union, the federal courts have always been very firm in claiming for themselves the right of deciding according to their own judgment, uncontrolled, and even uninfluenced, by any adjudications of the state courts on the same point. But on the other hand, they have not hesitated to concede to the courts of each state a like exclusive privilege and power of deciding upon the constitutionality of a statute when measured by the requirements of the state constitution. Therefore, when the highest court of a state has given its solemn judgment upon the validity of a statute of the state, as tested by its conformity or repugnance to the requirements of the state constitution, its decision will be accepted by all the federal courts, from the highest to the lowest, as absolutely final and as precluding any independent investigation of the same questions on their part. This rule is supported by an unbroken and uniform current of authorities stretching from almost the very foundation of the government to the present day.[50] And an examination of these authorities

[50] Montana ex rel. Haire v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490; Carstairs v. Cochran, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. Ed. 596; Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820; Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; Merchants' & Manufacturers' Nat. Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204; Atlantic & G.

will show that it makes no difference in the application of the rule whether the judgment of the state court was in favor of or against the validity of the statute. In either case it will bind the United States courts as a precedent. If the statute was adjudged constitutional, they will not hear any argument against it on the same grounds. If it was held void, they will consistently refuse to enforce it. On the latter point it was once remarked by Judge McCrary: "I am not aware that the federal courts have ever, in the course of our history, undertaken to enforce a state statute which has been held void by the supreme judicial authority of the state. I should hesitate long before undertaking to enforce in this tribunal any act of the state legislature which the supreme court of the state had held, for any reason, to be null and void. To do so would be to give suitors who can come here an unjust advantage over citizens of the state, who are compelled to submit their rights to the determination of the state courts." [51] Nor

R. Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Cass County v. Johnston, 95 U. S. 360, 24 L. Ed. 416; Leavenworth County v. Barnes, 94 U. S. 70, 24 L. Ed. 63; Gut v. Minnesota, 9 Wall. 35, 19 L. Ed. 573; Amey v. Allegheny City, 24 How. 364, 16 L. Ed. 614; Luther v. Borden, 7 How. 1, 12 L. Ed. 581; Nesmith v. Sheldon, 7 How. 812, 12 L. Ed. 925; Bank of Hamilton v. Dudley, 2 Pet. 492, 7 L. Ed. 496; Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648; Southern R. Co. v. McNeill (C. C.) 155 Fed. 756; Hughes v. Pflanz, 138 Fed. 980, 71 C. C. A. 234; Rees v. Olmstead, 135 Fed. 296, 68 C. C. A. 50; Kane v. Erie R. Co., 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788; Mohl v. Lamar Canal Co. (C. C.) 128 Fed. 776; Williams v. Stearns (C. C.) 126 Fed. 211; Underground R. R. v. City of New York, 116 Fed. 952; Estill County v. Embry, 112 Fed. 882, 50 C. C. A. 573; Clark v. Russell, 97 Fed. 900, 38 C. C. A. 541; Liverpool & London & Globe Ins. Co. v. Clunie (C. C.) 88 Fed. 160; Sutherland-Innes Co. v. Village of Evart, 86 Fed. 597, 30 C. C. A. 305; Hoyt v. Gleason (C. C.) 65 Fed. 685; Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Iron Co. (C. C.) 42 Fed. 372; Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457; Reclamation District No. 108 v. Hagar (C. C.) 4 Fed. 366, 6 Sawy. 567; Smith v. Tallapoosa County, 2 Woods, 574, Fed. Cas. No. 13,113; McCoy v. Washington County, 3 Wall. Jr. 381, Fed. Cas. No. 8,731; Dubois v. McLean, 4 McLean, 486, Fed. Cas. No. 4,107; Talcott v. Pine Grove, 1 Flip. 120, Fed. Cas. No. 13,735.

[51] Kaeiser v. Illinois Cent. R. Co. (C. C.) 18 Fed. 151. But see Talcott v. Pine Grove Tp., 1 Flip. 120, Fed. Cas. No. 13,735, holding

is it permissible or proper for the federal court to disparage the authority of the decision of the state court, on such a question, however profoundly the former court may be convinced that the latter court was in error, or however eccentric may appear its ruling when viewed in the light of general principles and of the general current of authorities. As declared by the United States Supreme Court, when the highest court of a state has decided that a certain statute is in harmony with the constitution of the state, a federal court will not be justified in holding adversely on the ground that the decision of the state court is in conflict with the general principles of constitutional law.[52] And if the state court has based its ruling upon the strict letter of the state constitution, still less is it permissible for the national courts to go outside the terms of that instrument in search of grounds for either sustaining or overthrowing the statute. The policy, the wisdom, the justice, or the fairness of a state statute, if these matters are suitable for the consideration of the state courts, are certainly not proper subjects for review or criticism by the courts of the United States.[53] On almost exactly similar principles, a federal court is bound by a decision of the supreme court of a state holding that, while an act of the legislature extending the boundaries of a city so as to embrace territory formerly included within other municipal corporations was void, as in conflict with the state constitution, yet it constituted color of law, and the validity of the city government established thereunder could not be inquired into after it had been organized, and had exercised authority over the annexed territory, for

that, where the decision of the highest court of a state, holding an act of the legislature unconstitutional, is not based upon any provision of the state constitution, but upon certain general principles, applicable alike, if correct, to all the state governments and that of the United States, the federal courts are not bound to follow such decision.

[52] Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

[53] Hunter v. City of Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151.

a number of years without question, and the prior municipal governments therein had been for that length of time dissolved and their records surrendered to the city, the question being one of purely local law; nor can the effect of such decision be avoided by allegations in the bill that complainants, as residents of the annexed territory, never acquiesced in or consented to the jurisdiction of the city over them or their property, where they took no steps to test its legality.[54]

Municipal Ordinances

The same rule applies to decisions of the highest court of a state concerning the constitutional validity of ordinances of its municipal corporations. When these are not questioned on the ground of their infringing or denying any rights secured by the federal constitution or laws, the question of their validity is entirely one of local law, as to which the judgment of the supreme judicial authority of the state is final and conclusive. If, therefore, the court of last resort in the state affirms the validity of a municipal ordinance, as, for instance, one passed in the exercise of the police power or regulating trades and occupations, its decision is binding on the federal courts, and they will not consider the question open to independent examination on their part.[55]

STATUTORY CONSTRUCTION IN GENERAL

174. The settled construction of a state statute, by the judicial decisions of the highest court of the state, constitutes a part of the law the same as if it were written into the terms of the act, and will be regarded by the courts of the United States (no

[54] McCain v. City of Des Moines, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936.

[55] Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597; Whitmier & Filbrick Co. v. City of Buffalo (C. C.) 118 Fed. 773.

federal question being involved) as absolutely and imperatively binding upon them as a rule of decision.

General Rule

The foregoing rule was announced by the Supreme Court of the United States at a very early day, and has ever since been consistently followed and adhered to.[56] The

[56] Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369; Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555; Tullis v. Lake Erie & W. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Missouri, K. & T. Ry. Co. v. McCann, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093; Illinois Cent. R. Co. v. Illinois ex rel. Butler, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 15 Sup. Ct. 896, 39 L. Ed. 1043; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; Cornell University v. Fiske, 136 U. S. 152, 10 Sup. Ct. 775, 34 L. Ed. 427; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L. Ed. 1091; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Lamborn v. Dickinson County Com'rs, 97 U. S. 181, 24 L. Ed. 926; Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Alcardi v. Alabama, 19 Wall. 635, 22 L. Ed. 215; Carroll County Sup'rs v. United States ex rel. Reynolds, 18 Wall. 71, 21 L. Ed. 771; City of Richmond v. Smith, Use of Clendenin, 15 Wall. 429, 21 L. Ed. 200; Morgan v. Town Clerk, 7 Wall. 610, 19 L. Ed. 202; Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Sumner v. Hicks, 2 Black, 532, 17 L. Ed. 355; Phalen v. Virginia, 8 How. 163, 12 L. Ed. 1030; Kinney v. Clark, 2 How. 76, 11 L. Ed. 185; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. Ed. 1029; Brashear v. West, 7 Pet. 608, 8 L. Ed. 801; Livingston v. Moore, 7 Pet. 469, 8 L. Ed. 751; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402; Ross v. McLung, 6 Pet. 283, 8 L. Ed. 400; Hinde v. Vattier, 5 Pet. 398, 8 L. Ed. 168; Henderson v. Griffin, 5 Pet. 151, 8 L. Ed. 79; United States v. Morrison, 4 Pet. 124, 7 L. Ed. 804; McCluny v. Silliman, 3 Pet. 270, 7 L. Ed. 676; Beach v. Viles, 2 Pet. 678, 7 L. Ed. 559; Gardner v. Collins, 2 Pet. 58, 7 L. Ed. 347; Ross v. Doe ex dem. Barland, 1 Pet. 655, 7 L. Ed. 302; Fullerton v. Bank of United States, 1 Pet. 604, 7 L. Ed. 280; Waring v. Jackson ex dem. Eden, 1 Pet. 570, 7 L. Ed. 266; Davis v. Mason, 1 Pet. 503, 7 L. Ed. 239; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. Ed. 227; Bell v. Morrison, 1 Pet. 351, 7 L. Ed. 174; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; Thatcher v. Powell, 6 Wheat. 119, 5 L. Ed. 221; Shipp v. Miller, 2 Wheat. 316, 4 L. Ed. 248; Mutual

theory upon which it rests is that the interpretation of the statutory law of a state is exclusively a matter for the judgment of the state tribunals, no question under the national constitution or laws being involved, and that, as the federal courts administer the laws of the several states in which they sit, in all cases not growing out of federal jurisdiction or federal law, they are to seek that law in the statute book of the state and its interpretation in the opinions of the highest court of the state. For it is a well recognized principle of statutory construction that a deliberate and settled interpretation placed upon a statute by a court having authority has the force of law, and is

Assur. Soc. v. Watts, 1 Wheat. 279, 4 L. Ed. 91; Polk v. Wendal, 9 Cranch, 87, 3 L. Ed. 665; McKeen v. Delancy, 5 Cranch, 22, 3 L. Ed. 25; Malloy v. American Hide & Leather Co., 185 Fed. 776, 107 C. C. A. 646; Yarrington v. Delaware & Hudson Co. (C. C.) 143 Fed. 565; Jacobs v. Glucose Sugar Refining Co. (C. C.) 140 Fed. 766; American Sugar Refining Co. v. City of New Orleans, 119 Fed. 691, 56 C. C. A. 328; People's Nat. Bank v. Marye (C. C.) 107 Fed. 570; Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County, Ohio (C. C.) 99 Fed. 846; Rummel v. Butler County (C. C.) 93 Fed. 304; Perkins v. Boston & A. R. Co. (C. C.) 90 Fed. 321; Lapp v. Ritter (C. C.) 88 Fed. 108; Bergman v. Bly, 66 Fed. 40, 13 C. C. A. 319; Berrian v. Rogers (C. C.) 43 Fed. 467; Raymond v. Parish of Terrebonne (C. C.) 28 Fed. 773; Wilson v. Neal (C. C.) 23 Fed. 129; Katzenberger v. City of Aberdeen (D. C.) 16 Fed. 745; Crooks v. Stuart (C. C.) 7 Fed. 800; New Hampshire v. Grand Trunk Ry. (C. C.) 3 Fed. 887; Woolsey v. Dodge, 6 McLean, 142, Fed. Cas. No. 18,032; Paine v. Wright, 6 McLean, 395, Fed. Cas. No. 10,676; Wick v. The Samuel Strong, 6 McLean, 587, Fed. Cas. No. 17,607; Griffing v. Gibb, McAll. 212, Fed. Cas. No. 5,819; Coolidge v. Curtis, 1 Bond, 222, Fed. Cas. No. 3,184; Evans v. City of Pittsburgh, Fed. Cas. No. 4,568; Merrill v. Town of Portland, 4 Cliff. 138, Fed. Cas. No. 9,470; Oliver v. City of Omaha, 3 Dill. 368, Fed. Cas. No. 10,499; Hawes v. Contra Costa Water Co., 5 Sawy. 287, Fed. Cas. No. 6,235; Bank of United States v. Longworth, 1 McLean, 35, Fed. Cas. No. 923; Thompson v. Phillips, Baldw. 246, Fed. Cas. No. 13,974; Springer v. Foster, 2 Story, 383, Fed. Cas. No. 13,266; Boyle v. Arledge, Hempst. 620, Fed. Cas. No. 1,758; Heydock v. Stanhope, 1 Curt. 471, Fed. Cas. No. 6,445; Olcott v. Fond du Lac County, 2 Biss. 368, Fed. Cas. No. 10,479; Levy v. Mentz, 23 La. Ann. 261; Commonwealth v. International Harvester Co. of America, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256.

of the same efficacy as if it were written into the language of the statute. "Legis interpretatio legis vim obtinet." And on these principles the courts of the United States base the rule that a construction placed upon a state statute by the highest judicial tribunal of the state, which has been adhered to and become the settled law of the state, is just as binding on the federal courts as if it constituted a part of the written act.[57] Hence it is immaterial that a federal court, if it merely undertook to construe the statute from a study of its language, would reach a different conclusion as to its meaning from that assigned to it by the state court. That conclusion will be laid aside, and the statute will be taken to mean what the state court declares it to mean.[58] And again, though it might be possible fairly to construe a state statute in such a manner as to reconcile it with the provisions of the federal constitution, yet if the highest court of the state has definitely interpreted it as having a particular meaning or applicability, that construction will be accepted as controlling by the United States Supreme Court, although the consequence is that it will thereby be compelled to adjudge the enactment unconstitutional and void.[59]

State Laws Extended over Territories

Where an act of Congress extends the general body of the statutory law of a particular state over one of the territories, it is a settled rule that the settled judicial construction of such statutes, fixed by the highest court of the state before the act of Congress, is presumed to have been adopted also and intended to constitute a part of the law so put in force in the territory. Therefore the federal courts sitting in the territory are imperatively bound to follow the decisions of the state court, on all questions concerning the meaning and application of those statutes,

[57] Joseph Dixon Crucible Co. v. Paul, 167 Fed. 784, 93 C. C. A. 204; Zeiger v. Pennsylvania R. Co. (C. C.) 151 Fed. 348; Olcott v. Fond du Lac County, 2 Biss. 368, Fed. Cas. No. 10,479.

[58] Commonwealth v. International Harvester Co. of America, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256.

[59] Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547.

at least where they were rendered before the adoption of the statutes by the act of Congress.[60]

Different Interpretations in Different States

Where two or more states have adopted statutes in the same or substantially the same terms, but their courts differ in regard to the interpretation of such a statute, the federal courts will administer the laws of each state, as therein construed, without regard to the apparent inconsistency which will result in their own decisions. In this event, such local statutes are treated as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.[61]

Requisites of Decision as a Precedent

The rule which requires the federal courts to follow the rulings of the state courts with reference to all questions of statutory construction "has grown up and been held with constant reference to the other rule, stare decisis; and it is only so far and in such cases as this latter rule can operate that the other has any effect. If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court and other courts organized under the common law has

[60] Robinson v. Belt, 100 Fed. 718, 40 C. C. A. 664; Appolos v. Brady, 49 Fed. 401, 1 C. C. A. 299; Sanger v. Flow, 48 Fed. 152, 1 C. C. A. 56; Rainwater-Boogher Hat Co. v. Malcolm, 51 Fed. 734, 2 C. C. A. 476.

[61] Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495; Christy v. Pridgeon, 4 Wall. 196, 18 L. Ed. 322; Louisiana ex rel. Southern Bank v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316.

never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." [62]

Absence of State Decisions and Conflicting Decisions

If there is no decision by the courts of a state on the interpretation of a statute of the state, and nothing on which to found a practical construction, or if the decisions of the state courts are conflicting and the interpretation unsettled, then the federal courts will decide for themselves as to the true construction of the statute.[63] And if the highest judicial tribunal of the state adopts new views as to the proper construction of a statute of the state, and reverses its former decisions, the federal courts will follow the latest settled adjudications.[64] But to this last rule there is a well-defined exception, which has been expressed as follows: "When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." [65]

Illustrations and Applications of Rule—Statute of Frauds

The construction which has been placed by the highest court of a state upon any particular clause or section of the statute of frauds, as in force in that state, furnishes an imperative rule for the decisions of the federal courts when

[62] Carroll v. Carroll's Lessee, 16 How. 275, 286, 14 L. Ed. 936.

[63] Gardner v. Collins, 2 Pet. 58, 7 L. Ed. 347; Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Myrick v. Heard (C. C.) 31 Fed. 241; Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457.

[64] Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Green v. Neal, 6 Pet. 291, 8 L. Ed. 402.

[65] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

administering the law of that state, irrespective of their own views, and without regard to the fact that the same words may be differently interpreted in other states.[66] Thus, for instance, the validity and effect of a guaranty of a note made in a given state is governed by the statute of frauds of that state, as interpreted by its courts, when sued on in a federal court; for that statute is a "law of the state" declared by the act of Congress to be the rule of decision in the United States courts, and the construction of it by the highest court of the state, being authoritative, is to be treated as a part of it.[67]

Criminal Statutes

Persons convicted of criminal offenses under the laws of the states frequently apply to the courts of the United States for release on habeas corpus (or on writ of error to the highest court of the state to bring up its judgment for review) on the allegation that they are deprived of their liberty without due process of law. This question depends upon the legality of the conviction, and that, in turn, very often depends on the construction of the statute under which the proceedings were had. In all such cases the federal courts consider themselves bound to adopt and follow a decision of the court of last resort in the state which adjudicates upon the meaning or application of the statute, if and in so far as it may be applicable to the precise question at issue.[68] As examples of the kind of questions which thus come before the federal courts, and as to which they hold themselves bound by any applicable ruling of the state supreme court, we may mention the following: Whether or not a conspiracy to defraud is a crime under the laws of the state;[69] whether an attorney at law, who fails to pay over money collected by him in his pro-

[66] Walker v. Hafer, 170 Fed. 37, 95 C. C. A. 311; Ballantine v. Yung Wing (C. C.) 146 Fed. 621.

[67] Moses v. Lawrence County Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743.

[68] Love v. Busch, 142 Fed. 429, 73 C. C. A. 545.

[69] Howard v. Fleming, 191 U. S. 126, 24 Sup. Ct. 49, 48 L. Ed. 121.

fessional capacity, may be convicted of the crime of "embezzlement as an agent";[70] whether the state statute providing for inquisitions of lunacy in criminal cases is sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after a verdict of guilty;[71] whether the resentencing of a criminal after the original sentence had been superseded is unlawful, or is merely in legal effect the fixing of a new date for the execution of the previous sentence, which is supposed to have remained constantly in force.[72]

Jurisdiction and Procedure; Remedies and Defenses

The nature and extent of the jurisdiction vested in the various courts of a state, and the powers and functions which they may lawfully exercise, are peculiarly matters of local law, at least where there is no question of their infringing upon the appropriate sphere of the federal courts; and as to all such matters, the statutes of the state, as interpreted and applied by its courts, furnish the rule for the decisions of the United States courts, the rulings of the highest court of the state being of imperative authority.[73] Thus, the power of the inferior courts of a state to make an order at one term to take effect as of another is of a character so essentially local, and a proceeding so necessarily dependent on the revising tribunal of the state, that the Supreme Court of the United States will conform to the decision of the latter.[74] So where a court of the state has held that it had jurisdiction, under a statute of the state, of a petition for naturalization and has granted a certificate of citizenship, a federal court of concurrent jurisdiction, in a proceeding by the government to cancel the certificate for want of jurisdiction in the state

[70] In re Converse (C. C.) 42 Fed. 217.

[71] Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515.

[72] Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515.

[73] Forsyth v. City of Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; Freeport Water Co. v. City of Freeport, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; Danville Water Co. v. City of Danville, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696.

[74] Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492, 7 L. Ed. 496.

court, will, on grounds of comity if for no other reason, reach a conclusion as to the construction of the state law in harmony with that of the state court.[75] And again, a decision by the supreme court of a state that the procedure by which a state officer was removed from office by the governor was regular and pursuant to a valid state statute, is not reviewable by the federal supreme court, unless fundamental rights protected by the federal constitution have been infringed.[76] The same principle applies generally to state laws giving or regulating rights of action, prescribing the procedure to be followed in the courts of the state, and specifying the defenses which may or must be set up in certain actions. When a cause of action, not existing at common law, is created by a state statute, the question when and to whom the right of action accrues, and what conditions authorize its enforcement, is one of judicial construction, as to which the decisions of the highest court of the state are controlling on the federal courts.[77] An example may be drawn from the laws now in force in many of the states, all more or less directly copied from the English statute known as "Lord Campbell's act," giving a right of action in damages against one who has negligently or wrongfully caused the death of a human being. Where such a statute gives the right of action to the surviving relatives of the deceased, the question whether it extends to one who, though a relative, is an alien and a non-resident, is one of construction, and the decision of the highest court of the state on this point will be accepted and followed by the courts of the United States, unless the solution of the question may be affected in some way by the provisions of a treaty with a foreign power.[78] So also the decisions of the highest court of the state with respect to the measure of damages re-

[75] United States v. Andersen (D. C.) 169 Fed. 201.

[76] Wilson v. North Carolina ex rel. Caldwell, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865.

[77] Whitman v. Atkinson, 130 Fed. 759, 65 C. C. A. 185.

[78] Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792; Fulco v. Schuylkill Stone Co., 169 Fed. 98, 94 C. C. A. 498.

coverable in an action on such a statute will be followed by the United States courts.[79] And if the statute provides for the recovery of "such damages as the jury may assess," and this phrase has been construed by the supreme court of the state as awarding exemplary damages, and has been declared by that court to be constitutional as so interpreted, a federal court will accept this decision as a binding precedent.[80] For similar reasons, where a person buys goods in good faith and without notice of fraud on the part of the seller, and, as a part of the consideration, agrees to pay certin outstanding claims against the vendor, a rule established by the court of last resort in the state, whereby the purchaser is liable to an action by the persons for whose benefit the promise was made, will be followed by the federal court in a suit by creditors of the vendor to recover from the purchaser the amount of such claims.[81] The same rule applies to decisions of the state court as to the enforcement of a mortgage given to secure the payment of alimony, since they involve the construction of the state divorce laws,[82] and to the interpretation placed by the state courts upon the provisions of a statute with reference to the method of serving process in an action against a foreign corporation.[83] So also, where the state law provides for "costs in cases of partition," its construction by the state courts as allowing the award of a counsel fee to the plaintiff in an action of partition will be followed by the federal courts.[84] The same rule applies to the defenses in an action in so far as they may be prescribed or controlled by a statute of the state. If, for instance, the matter of set-off or counterclaim is thus regulated by law, the decisions of the state courts upon the construction of

[79] Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303.

[80] Louisville & N. R. Co. v. Lansford, 102 Fed. 62, 42 C. C. A. 160.

[81] Sonstiby v. Keeley (C. C.) 11 Fed. 578.

[82] Whitney v. Whitney Elevator & Warehouse Co. (C. C.) 180 Fed. 187.

[83] Eaton v. St. Louis Shakspear Min. & Smelting Co. (C. C.) 7 Fed. 139.

[84] Willard v. Serpell (C. C.) 62 Fed. 625.

the statute will furnish a binding rule for the determination of like questions in the federal courts.[85] Thus, in Illinois, the statute, as interpreted by the courts, does not authorize a set-off, in an action on contract, of claims for unliquidated damages arising out of contracts or torts not connected with the subject-matter of the suit. And therefore, in an action at law in a federal court in that state, there can be no set-off of such damages, even as against an insolvent or a non-resident plaintiff.[86] Again, if a state law relating to the precautions which railroad companies are required to take to avoid accidents, and providing that the failure to observe the same shall make the company liable in damages, is construed by the highest court of the state as giving damages notwithstanding contributory negligence, this construction must be followed by the federal courts.[87] So also, these courts will consider themselves bound to follow a decision of the state court upon the question whether or not the state statute requires claims for damages because of the inferior quality of an article for the purchase price of which a note was given to be set up in an action on the note, so as to be concluded by the judgment.[88] And they are equally bound by a rule established by the highest court of the state, interpreting its statutes, that seven years' successive payment of taxes under color of title, on wild and uninclosed land, is equivalent to seven years' actual adverse possession.[89]

Law of Private Corporations

In regard to the rights, powers, duties, and liabilities of private corporations organized under the laws of a state, the decisions of the highest court of the state, construing and applying its statutes, are imperatively binding on the federal courts and will be followed in all applicable cases.[90]

[85] Dotson v. Kirk, 180 Fed. 14, 103 C. C. A. 368.

[86] Charnley v. Sibley, 73 Fed. 980, 20 C. C. A. 157.

[87] Rogers v. Cincinnati, N. O. & T. P. Ry. Co., 136 Fed. 573, 69 C. C. A. 321.

[88] Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179.

[89] Forshaw v. Layman, 182 Fed. 193, 104 C. C. A. 559.

[90] Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup.

As once observed by an eminent federal judge: "There is no class of cases where they [the federal courts] follow, and for obvious reasons ought to follow, the decisions of the state courts more implicitly than that in which those courts define and limit the powers of corporations created under the statutes of their respective states. What a medley of contradiction, confusion, and conflict would result if such corporations could exercise powers under the decisions of the national courts which are denied to them by the courts of their respective states." [91] So also, state statutes imposing requirements on foreign corporations as a condition precedent to their doing business in the state are valid, if reasonable in their provisions, and will be enforced by the federal courts, which will follow the construction placed on them by the courts of the state.[92] And where the word "corporation" is used in a particular statute, the decision of the highest court of the state that it includes only corporations created under the laws of the state (or, conversely, that it may include foreign corporations) establishes a rule which will be observed by the courts of the United States.[93] So where the state statute forbids the alienation or incumbrance of mining property belonging to a corporation, except the act be ratified by a certain proportion of the stockholders, the question whether this applies to foreign corporations owning such property within the state, the question of the persons who may take advantage of this prohibition, and the question of how the stockholders may proceed to give or manifest

Ct. 404, 53 L. Ed. 682; Stone v. Southern Illinois & M. Bridge Co., 206 U. S. 267, 27 Sup. Ct. 615, 51 L. Ed. 1057; Consumers' Gas Trust Co. v. Quinby, 137 Fed. 882, 70 C. C. A. 220; San Diego Flume Co. v. Souther, 90 Fed. 164, 32 C. C. A. 548.

[91] Schofield v. Goodrich Bros. Banking Co., 98 Fed. 271, 39 C. C. A. 76, per Sanborn, J.

[92] Tennis Bros. Co. v. Wetzel & T. Ry. Co. (C. C.) 140 Fed. 193; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. Ed. 331; Semple v. Bank of British Columbia, 5 Sawy. 88, Fed. Cas. No. 12,659; Buffalo Refrigerating Machine Co. v. Penn Heat & Power Co., 178 Fed. 696, 102 C. C. A. 196.

[93] United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Swarts v. Christie Grain & Stock Co., 166 Fed. 338.

their acquiescence, are all matters of local law, as to which the judgments of the highest court of the state will be accepted by the federal courts as conclusive precedents.[94] So also as to the liabilities of corporations and their officers and stockholders. In a suit in a federal court to charge a director of a corporation, under a state statute, with the amount of a liability of the corporation, the primary question of the existence of such liability of the company will not be investigated if it has already been determined by the judgment of the state court.[95] So as to the time when a stockholder's statutory liability for debts of the corporation attaches, whether at the time of the dissolution of the company or at the date of the maturity of the obligation; the state court's decision of this question will be followed by the federal courts.[96] And similarly, where a statute imposes on the officers of a corporation a personal liability for its debts if they fail to file the required annual report, a decision of the state court that this provision is remedial and not penal is conclusive.[97] The same may be said as to the decision of the supreme court of a state on the question whether the charter of a particular company is subject to alteration or repeal by act of the legislature;[98] the question whether a corporation chartered by the legislature of that state has violated its charter by the act of taking a certain mortgage;[99] and the question whether a notice to a corporation to produce its books and papers before a grand jury conforms to the provisions of the statute regulating the subject.[100] So where a state statute regulating the dis-

[94] Williams v. Gaylord, 102 Fed. 372, 42 C. C. A. 401; Id., 186 U. S. 157, 22 Sup. Ct. 798, 46 L. Ed. 1102.

[95] National Park Bank v. Remsen, 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008.

[96] Ramsden v. Knowles (C. C.) 151 Fed. 718.

[97] Proctor-Gamble Co. v. Warren Cotton Oil Co. (C. C.) 180 Fed. 543.

[98] Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

[99] Smith v. Kernochen, 7 How. 198, 12 L. Ed. 666.

[100] Consolidated Rendering Co. v. State of Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327.

solution of corporations has been interpreted by the highest court of the state, the construction placed upon it will be adopted by the federal courts in dealing with a corporation subject to the statute.[101] And so also of a statute which authorizes a suit by any creditor or stockholder to wind up the affairs of a corporation which has become insolvent or suspended its business.[102]

Municipal Corporations

The extent of the powers and liabilities of municipal corporations under the statutes of the state in which they are organized is a question of local law, upon which the decisions of the courts of the state are binding upon the federal courts.[103] For example, where the question is as to the authority of a city or county to incur indebtedness and issue bonds, to aid in the construction of a railroad or other work of internal improvement, or to acquire or construct public buildings, bridges, municipal waterworks, or the like, and this depends upon the construction of a statute of the state, the decision of the highest court of the state will be accepted as final and conclusive by the courts of the United States in any action on the bonds or any collateral litigation.[104]

Execution and Attachment Laws

All questions growing out of the construction and application of those statutes of a state which regulate the execution of final process and the use of the writ of attachment are regarded as questions of local law, in so much that when the supreme court of the state has laid down a

[101] In re Munger Vehicle Tire Co., 159 Fed. 901, 87 C. C. A. 81.

[102] McGraw v. Mott, 179 Fed. 646, 103 C. C. A. 204.

[103] Blaylock v. Incorporated Town of Muskogee, 117 Fed. 125, 54 C. C. A. 639; Thompson v. Searcy County, 57 Fed. 1030, 6 C. C. A. 674; Goodrich v. City of Chicago, 4 Biss. 18, Fed. Cas. No. 5,542; Johnson v. City of St. Louis, 172 Fed. 31, 96 C. C. A. 617.

[104] Scipio v. Wright, 101 U. S. 665, 25 L. Ed. 1037; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. Ed. 544; Thompson v. Lee County, 3 Wall. 327, 18 L. Ed. 177; First Nat. Bank of North Bennington v. Arlington, 16 Blatchf. 57, Fed. Cas. No. 4,806; City of Sioux Falls v. Farmers' Loan & Trust Co., 136 Fed. 721, 69 C. C. A. 373; Folsom v. Township of Ninety-Six (C. C.) 59 Fed. 67.

rule in a matter of this kind, the courts of the United States will feel constrained to adopt and follow it in all applicable cases without independent consideration of the subject-matter.[105] Thus, they will implicitly follow the adjudications of the highest court of the state in regard to the giving of an attachment bond and the amount of its penalty,[106] and in regard to the measure of damages recoverable for the breach of such a bond.[107] So, if the highest court of the state has decided that, under its constitution and laws, property situated in that state, the title to which is vested in a non-resident executor to whom letters testamentary have been issued by a court of another jurisdiction, may be attached and sold in an action of debt against such non-resident executor, this decision is binding upon the Supreme Court of the United States on writ of error to the state court.[108]

Condemnation Proceedings

Proceedings for the appropriation of private property for public use, under the power of eminent domain, may involve the question whether or not the citizen has been deprived of his property "without due process of law," within the meaning of the federal constitution.[109] This is a federal question. And when it is properly presented in a case within their jurisdiction, the federal courts will pro-

[105] United States v. Morrison, 4 Pet. 124, 7 L. Ed. 804; Rice v. Adler-Goldman Commission Co., 71 Fed. 151, 18 C. C. A. 15; Lehman v. Berdin, 5 Dill. 340, Fed. Cas. No. 8,215.

[106] Fleitas v. Cockrem, 101 U. S. 301, 25 L. Ed. 954.

[107] L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland, 109 Fed. 393, 48 C. C. A. 436.

[108] Manley v. Park, 187 U. S. 547, 23 Sup. Ct. 208, 47 L. Ed. 296.

[109] See Davidson v. New Orleans, 96 U. S. 107, 24 L. Ed. 616, in which Mr. Justice Bradley said: "If a state, by its laws, authorized private property to be taken for public use without compensation, I think it would be depriving a man of his property without due process of law." And see Kentucky Railroad Tax Cases, 115 U. S. 331, 6 Sup. Ct. 57, 29 L. Ed. 414; Backus v. Fort Street Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; Huling v. Kaw Valley R. & Improv. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045; Baker v. Village of Norwood (C. C.) 74 Fed. 997; Scott v. City of Toledo (C. C.) 36 Fed. 385, 1 L. R. A. 688.

ceed to determine it in accordance with their own previous decisions in similar cases and in the light of the general principles of constitutional law, but without feeling constrained to yield any special deference to the rulings of the courts of the state in which the controversy originated. But questions concerning an alleged conflict between the statute under which the proceedings are taken and the constitution of the state, and questions as to the jurisdiction and powers of the state courts and as to the propriety of the procedure followed in such cases, are of a different nature. Not involving rights under the national constitution or laws, but only a construction of the constitution and laws of the state, they are peculiarly within the cognizance of the state courts, and their rulings on such points are of controlling authority in the federal courts.[110] Thus, a decision by the supreme court of a state that a statute making provision for the improvement of certain rivers failed to give the landowner a right to institute condemnation proceedings to have his compensation determined, or to make adequate provision for such compensation, is binding on the Supreme Court of the United States.[111] So as to the authority of the court of first instance in such proceedings. In a case in New Jersey, a circuit court of that state, on an appeal in a proceeding in which one railroad company had condemned a right of way across the tracks of another, decided that it had authority under the state statute to allow an amendment altering the plan of crossing. This decision, not having been reversed at the time, was held to be binding on the United States circuit court.[112] So also, decisions by the supreme court of the state that the fee to the bed of a canal constructed by the state was vested in the state by the condemnation proceedings, and that the commissioners ap-

[110] Long Island Water-Supply Co. v. City of Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; Backus v. Fort Street Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853.

[111] Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004.

[112] Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co. (C. C.) 58 Fed. 929.

pointed to assess damages had authority to consider benefits, will be followed by the federal courts.[113]

Insolvency and Assignments for Creditors

Where no federal question is involved, the construction and effect of a state statute regulating proceedings in insolvency and the distribution of insolvent estates, or one governing assignments for the benefit of creditors, are matter of local law, upon which the decisions of the highest court of the state are of controlling authority in the courts of the United States.[114] Thus where the state court has considered the effect of preferences given to creditors in a general assignment of the debtor's property, and has sustained the validity of such preferences, the United States courts will follow the rule thus established.[115] On the other hand, a statute providing that a fraudulent preference by a debtor shall operate as a general assignment for the benefit of his creditors, being a rule of property in the state, the construction thereof by the highest court of the state, making the mode of distribution of the debtor's assets, as to creditors having liens or collateral securities, the same as in cases of insolvent decedents, will control the federal courts in that state.[116] Again, the creation of liens or titles by proceedings in insolvency is governed by the law of the state regulating such proceedings, and the construction of that law by the state court will be followed by the United States courts.[117] For instance, the New York Court of Appeals, construing the mechanics' lien law of that state, has held that, during the time a laborer,

[113] Kennedy v. Indianapolis, 11 Biss. 13, Fed. Cas. No. 7,703.

[114] Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; Union Nat. Bank of Chicago v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; South Branch Lumber Co. v. Ott, 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136; May v. Tenney, 148 U. S. 60, 13 Sup. Ct. 491, 37 L. Ed. 368; Rice v. Frayser (C. C.) 24 Fed. 460; Rothschild v. Hasbrouck (C. C.) 72 Fed. 813.

[115] Parker v. Phetteplace, 2 Cliff. 70, Fed. Cas. No. 10,746.

[116] Marbury v. Kentucky Union Land Co., 62 Fed. 335, 10 C. C. A. 393.

[117] Perry Mfg. Co. v. Brown, 2 Woodb. & M. 449, Fed. Cas. No. 11,015.

mechanic, materialman, or subcontractor is entitled to file his lien, he has a preferential statutory claim, in the nature of a non-perfected equitable lien, which cannot be defeated by the party against whom it might be asserted by a general assignment for the benefit of his creditors. This decision, it is held, is of controlling authority in the United States courts, and must be accepted and its principles applied by them in applicable cases.[118]

Insurance Contracts

A state may constitutionally, in the exercise of its police power, declare its public policy in respect to contracts of insurance, and impose conditions on the transaction of business in the state by insurance companies, domestic and foreign, as it may deem best, and such enactments are binding upon the federal courts sitting within the state in cases within their purview.[119] Such a court, in exercising jurisdiction concurrent with the courts of a state in actions on policies of insurance, is administering the law of the state, and is as much bound by its statutory and common law and by its declared public policy, as would be a state court in a like case.[120] Therefore, upon questions of this kind, the rules and principles laid down by the highest court of the state in its judicial decisions are imperatively binding upon the federal courts as precedents. Such, for instance, is the case where the supreme court of the state has ruled that a certain provision of the statute on the subject is equally applicable to foreign insurance companies, admitted to do business in the state, as to domestic companies;[121] or where it has been decided, by the like authority, that a statute relative to the writing of insurance by any "company, corporation, association, or partnership" is separable in its provisions

[118] In re Grissler, 136 Fed. 754, 69 C. C. A. 406.

[119] McClain v. Provident Sav. Life Assur. Soc., 110 Fed. 80, 49 C. C. A. 31.

[120] New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; McClain v. Provident Sav. Life Assur. Soc., 110 Fed. 80, 49 C. C. A. 31.

[121] McClain v. Provident Sav. Life Assur. Soc., 110 Fed. 80, 49 C. C. A. 31.

with respect to these different bodies;[122] or where a similar decision has been announced with reference to the validity of particular conditions contained in policies of insurance.[123] On the same principle, where the court of last resort of the state has considered and determined the effect on existing policies of life insurance of the repeal of a statute whereby it had been enacted that the suicide of the insured should not be a defense to an action on the policy, the rule which it declares will be binding on the federal courts.[124] So the construction by the state courts of a state statute which penalizes life insurance companies for failure to pay losses, as requiring a demand of payment notwithstanding the company's denial of liability, but as further providing that such demand can be made after suit brought and can be set up by an amended petition, will be adopted by the courts of the United States.[125] And the same is true of the interpretation of a statute relating to the application as a part of the policy and to its admissibility in evidence.[126]

Public Lands and Grants

Where an action in a federal court depends on the construction of a state statute relating to the public lands, or their boundaries, or their grant, sale, or other disposition, the court is required to adopt the construction placed on the statute by the highest court of the state.[127] Thus, where the legislature of a state made a grant of the public lands "lying between high tide and ship channel," the question of the meaning of the latter term is one of local law; and where the supreme court of the state had determined that it comprises waters left free to navigation

[122] Noble v. Mitchell, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472.

[123] Small v. Westchester Fire Ins. Co. (C. C.) 51 Fed. 789.

[124] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139.

[125] Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204.

[126] Manhattan Life Ins. Co. v. Albro, 127 Fed. 281, 62 C. C. A. 213.

[127] Lockard v. Asher Lumber Co., 131 Fed. 689, 65 C. C. A. 517; Southern Pac. Co. v. Western Pac. Ry. Co. (C. C.) 144 Fed. 160.

and the definite natural boundary of such waters as the line of low tide, its decision will be followed by the United States courts.[128] So, the Supreme Court of California having located the boundaries of the grant of the Oakland water front, in determining the extent and validity of the grant, such boundaries will be followed by a United States circuit court in determining conflicting claims of parties claiming title to lands on such water front.[129]

Estates and Conveyances

The vesting and tenure of estates in land and the requisites and effect of conveyances thereof are peculiarly matters of local law and local regulation, as to which the courts of the state are the authoritative interpreters of its statutes, and their decisions are of controlling authority in the United States courts. Thus, when the courts of a given state have by uniform decisions fixed the meaning and effect of a statute of the state relating to estates created by deed or will, their decisions will be followed by the federal courts in cases originating in that state.[130] Thus a decision of the court of last resort in the state that an estate passing by will is a statutory estate, and that an effort of the testator to control it further would be in contravention of the statute, will be accepted as binding.[131] So, where there is a state law directing the manner and form of the examination of a married woman on making a deed jointly with her husband conveying her separate lands, the construction placed upon such statute by the highest court of the state, declaring what the necessary requirements are in order to make such examination effective, becomes a rule of property in that state which is binding upon the federal courts.[132]

[128] Southern Pac. Co. v. Western Pac. Ry. Co. (C. C.) 144 Fed. 160.

[129] Southern Pac. Co. v. Western Pac. Ry. Co. (C. C.) 144 Fed. 160.

[130] Buford v. Kerr, 90 Fed. 513, 33 C. C. A. 166.

[131] Buford v. Kerr (C. C.) 86 Fed. 97.

[132] Gillespie v. Pocahontas Coal & Coke Co., 163 Fed. 992, 91 C. C. A. 494; Berry v. Northwestern & P. Hypotheek Bank, 93 Fed. 44, 35 C. C. A. 185.

Mortgages and Liens

In regard to the creation, validity, and effect of liens of all kinds, the statutes of the particular state control, and their interpretation by the chief court of the state furnishes the rule for the decisions of the federal courts in similar cases originating within the state.[133] Thus, for example, the lien of judgments depends upon the law of the state in which they are asserted; and the courts of the United States, in determining their nature and priority, will be governed by the construction put upon those laws by the highest court of the state.[134] So again, the validity of an unregistered mortgage, as between the parties, is a question upon which the decision of the highest court of a state is controlling on the federal courts sitting in that state.[135] Again, the question whether a chattel mortgage is void under a state statute, as being a common-law assignment for the benefit of creditors with preferences, is purely a question of local law; and it should be decided by a federal court in accordance with the latest exposition of the law by the highest tribunal of the state.[136]

Fraudulent Conveyances

The circumstances under which a conveyance of property shall be deemed fraudulent as to creditors, or the proper subject of a creditor's bill, also depend on the local law. And therefore, if a deed has been adjudged valid by the supreme court of the state, as not being a conveyance in fraud of creditors, it must likewise be held valid in the federal courts.[137]

Wills and Administration

The several states retain control of the law regulating wills, their requisites, validity, and probate, the descent and

[133] Stapp v. The Swallow, 1 Bond, 189, Fed. Cas. No. 13,305; Hay v. Alexandria & W. R. Co. (C. C.) 20 Fed. 15.

[134] Pence v. Cochran (D. C.) 6 Fed. 269.

[135] Walter A. Wood Co. v. Eubanks, 169 Fed. 929, 95 C. C. A. 273.

[136] Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817; In re Oliver, Fed. Cas. No. 10,492.

[137] Moulton v. Chafee (C. C.) 22 Fed. 26.

distribution of property, and the administration of estates. These are matters of local law, governed by the local statutes as expounded and interpreted by the courts. Hence a federal court, in administering the law of the state in which it sits, will be controlled in its decisions on all such questions by the rulings of the highest court of the state. For example, a decision by the supreme court of the state that, under the statutes of the state, a charitable bequest for beneficiaries to be selected by the trustees is sufficiently certain; will be followed by the federal courts.[138] So a judgment by a state court in an action by an administrator de bonis non to recover land, determining that, under the statutory law of the state, the land never came within his control or disposition, but was fully administered upon by his predecessor, is conclusive against the right of his assignee to subject such land to a lien in a subsequent action in the United States court.[139]

Interest and Usury

When the highest court of a state has authoritatively construed its statutes relating to interest and to the penalties of usury, its judgments will be respected as binding precedents for the decision of like cases in the federal courts.[140] For instance, if the supreme court of the state has decided that a statute reducing the rate of legal interest on judgments applies to judgments in force at the time of its enactment, and that a judgment (though rendered in an action for breach of contract) is not within a saving clause in the statute relating to "any prior contract," this ruling will be accepted by the Supreme Court of the United States as a conclusive exposition of the meaning of the statute.[141] So again, the interpretation of a state statute against usury, by the highest court of the state, as being

[138] Loring v. Marsh, 6 Wall. 337, 18 L. Ed. 802.

[139] White v. Warburton, 122 Fed. 911, 59 C. C. A. 137.

[140] Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; Brown v. Grundy (D. C.) 111 Fed. 15; Union Mortgage, Banking & Trust Co. v. Hagood (C. C.) 97 Fed. 360.

[141] Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925.

applicable to a loan made by a foreign building and loan association to a resident of the state through a local agent, and as expressing the public policy of the state, which the parties could not, by their contract, contravene, is binding on the supreme federal court on a writ of error to review a judgment of the state court which is claimed to have denied full faith and credit to the public acts and records of that state wherein the association was domiciled.[142]

Sunday Laws

Laws regulating the observance of Sunday as a holiday and prohibiting labor and business on that day are a part of the internal police of each state, and their authoritative interpretation belongs to the courts of the state. Thus, the decisions of the highest court of a state as to the effect of its Sunday laws upon contracts made and to be performed within the state are controlling upon the federal courts, as, upon the question whether a mortgage executed on that day is valid or not.[143] So an adjudication of the supreme court of a state to the effect that there can be no recovery of damages for injuries recived by a plaintiff while traveling on a railroad on Sunday, contrary to the statute of the state on that subject, will be accepted by the United States Supreme Court as a binding exposition of the local law, although, in following the decision of the state court, it is compelled to lay aside its own contrary opinion of the law.[144]

Regulation of Carriers

Statutes enacted in the exercise of the police power, and in the interests of the public safety and comfort, to regulate the transportation of persons and property, and particularly by steam railroads, have often been assailed in the courts on the ground of their attempting an unlawful interference with interstate commerce, or on the ground

[142] National Mutual Bldg. & Life Ass'n v. Brahan, 193 U. S. 635. 24 Sup. Ct. 532, 48 L. Ed. 823.

[143] Hill v. Hite, 85 Fed. 268, 29 C. C. A. 549, affirming (C. C.) 79 Fed. 826.

[144] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

of their conflict with some other provisions of the federal constitution, such as those relating to due process of law or the equal protection of the laws. The question of the validity of such a statute, when attacked on these grounds, is one of federal cognizance, and the federal courts, in deciding it, will be governed by their own precedents and their own judgment, irrespective of the decisions of the state courts. But where no such federal question is involved, and the dispute is as to the validity of the statute as tested by the constitution of the state, or as to its meaning and application, the matter is one of local law, and the federal courts will follow the decisions of the highest court of the state as controlling authorities.[145]

STATUTE OF LIMITATIONS

175. In applying the statute of limitations of a given state, the federal courts will be controlled by the decisions of the highest court of the state as to its meaning and effect.

This is a very important branch of the general rule which requires the United States courts to follow the decisions of the state courts on questions of statutory construction. The limitation of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is brought, as construed by its highest court, whose adjudications will be accepted by the federal courts as conclusive evidence of the meaning and effect of the statute,[146]

[145] Chesapeake & O. Ry. Co. v. Kentucky, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244; New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

[146] Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72; Balkam v. Woodstock Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Moores v. Citizens' Nat. Bank, 104 U. S. 625, 26 L. Ed. 870; Leffingwell v. Warren, 2 Black, 599, 17 L. Ed. 261; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. Ed. 1029; Cheatham v. Evans, 160 Fed. 802, 87 C. C. A. 576; Brunswick Terminal Co. v. National Bank, 99 Fed. 635.

even though it should result that the same words or phrases are made to bear a different construction according as the controversy originated in one state or another.[147] In the first place, the question may arise whether there is any statute of limitations in force in the particular state applicable to actions of a certain class. When the highest court of the state has decided this question, the federal courts will follow and be bound by its adjudication.[148] Again, on the question whether the running of the statute is suspended by temporary absences from the state, the debtor retaining a fixed residence therein, and as to the suspension of the statute after his death and until the appointment of an administrator, the courts of the United States will follow the decisions of the state courts.[149] So it is also as to the meaning of the phrase "beyond the seas" in the saving clause of the statute,[150] and as to the question whether a foreign corporation can avail itself of the state statute of limitations.[151] So also, where a suit in equity is brought in a federal court to quiet title as against the purchaser of notes for the purchase price of which a vendor's lien has attached, the court will apply the rule of local law that, when a debt is barred by the statute of limitations, an action to foreclose a lien or mortgage given

40 C. C. A. 22, 48 L. R. A. 625; Bullion & Exchange Bank v. Hegler (C. C.) 93 Fed. 890; Elder v. McClaskey, 70 Fed. 529, 17 C. C. A. 251; Andrews v. Bacon (C. C.) 38 Fed. 777; Moores v. Citizens' Nat. Bank, 11 Fed. 624; Boyle v. Arledge, Hempst. 620, Fed. Cas. No. 1,758; Nicolls v. Rodgers, 2 Paine, 437, Fed. Cas. No. 10,260; Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336; Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 107 C. C. A. 93.

[147] Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

[148] Black v. Elkhorn Min. Co. (C. C.) 47 Fed. 600, citing Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. Ed. 331; Barrett v. Holmes, 102 U. S. 657, 26 L. Ed. 291.

[149] Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Barney v. Oelrichs, 138 U. S. 529, 11 Sup. Ct. 414, 34 L. Ed. 1037; Penfield v. Chesapeake, O. & S. W. R. Co., 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940.

[150] Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495.

[151] Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. Ed. 331; Taylor v. Union Pac. R. Co. (C. C.) 123 Fed. 155

as security for the debt is also barred.[152] On the same principle, in a proceeding begun in a state court to recover a legacy by a remedy given by the state statute, it will be held by a federal court to which the action has been removed, in conformity with the decisions of the state courts, that a claim barred by the statute of limitations cannot be set off against such legacy.[153] For the same reason, a non-resident owner of a claim against a decedent's estate cannot maintain an action against the administrator in a federal court, where the suit, if brought in the state court, would have been barred by the statutes of the state as construed by its courts, because instituted after the expiration of the period limited by the order of the probate court for the presentation of claims against the estate, and after decree for final distribution of the estate.[154] It is so also with regard to the manner of pleading the statute. When the state court has decided that the local code of procedure permits the statute of limitations to be set up by demurrer, if the complaint shows that the statutory time has run, whether the suit is of legal or equitable cognizance, this decision is of controlling authority in the federal courts sitting in that state.[155]

Nevertheless, this rule is subject to a few well-defined exceptions. Thus, where the United States sues in one of its own courts, the statute of limitations of the state in which the suit is brought has no application.[156] And again, it must be remembered that, while equity generally follows the analogy of the statute of limitations, it is not invariably applied in quite the same way as in actions at law, and that the federal courts have an equity system of their own, in the administration of which they are not controlled by the rulings of the state courts. Thus, it is a well-established

[152] Dupree v. Mansur, 214 U. S. 161, 29 Sup. Ct. 548, 53 L. Ed. 950.

[153] Wilson v. Smith (C. C.) 117 Fed. 707, affirmed 126 Fed. 916, 61 C. C. A. 446.

[154] Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147.

[155] Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806.

[156] United States v. Thompson, 98 U. S. 486, 25 L. Ed. 194.

rule of equity jurisprudence that, where an action is based on an alleged fraud or concealment, time will not begin to run in favor of the defendant until the discovery of the fraud, or until the exercise of reasonable diligence would have brought it to light. Hence in a suit in equity in a federal court to open a settlement on the ground of fraud, the court will follow the statute of limitations of the state where the action is brought, except as to the rule above mentioned; but as to the latter, it will be applied to the case without regard to the provisions of the state statute.[157]

EXEMPTION LAWS

176. When applying the exemption laws of a particular state, the federal courts will be governed by the decisions of the highest courts of the state as to the meaning and effect of such laws.

This rule finds a special application in cases of bankruptcy. The present bankruptcy statute provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition." [158] A bankruptcy court has exclusive jurisdiction to determine claims to exemptions. But in so doing, when questions arise as to the nature or extent of the exemption which may be claimed, or the property to which the statute applies, or other like questions, it will be governed by the construction placed on the state statute by the highest court of the state. because, pro tanto, it is the local law which it is to administer.[159] Thus, for instance, on the question of the

[157] Kirby v. Lake Shore & M. S. R. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868, 35 C. C. A. 62. And see Brigham-Hopkins Co. v. Gross (C. C.) 107 Fed. 769.

[158] Bankruptcy Act July 1, 1898, c. 541, § 6a, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424).

[159] In re Baker, 182 Fed. 392, 104 C. C. A. 602; In re National Grocer Co., 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982;

right of the individual members of a bankrupt firm to have set apart to them, out of the partnership assets, the exemptions allowed by the law of the state, the court of bankruptcy will follow the rule established by the decisions of the highest court of the state, if any such have been rendered.[160] But if the particular point, as to the interpretation of the state statute, has not yet been adjudicated by the supreme court of the state, then the court of bankruptcy will apply to the problem the general and well-established rules of statutory construction.[161] Of course the rule is not restricted to bankruptcy proceedings. Speaking generally, the decisions of the highest state court as to homestead exemptions, under the state constitution and laws, are binding on the United States courts.[162] And if a decision of the state court shows that it is the policy of the state that its exemption laws should be liberally construed, it will be proper for the federal courts to follow the same policy in considering whether or not certain real estate within the state is subject to execution issued out of the national courts.[163]

REVENUE AND TAX LAWS

177. Where no federal question is involved, decisions of the highest court of a state, construing its revenue and tax laws, will be regarded by the federal courts as binding and conclusive precedents for their determination of like cases.

In general, and where no conflict with the constitution or laws of the United States is suggested, the states have absolute control over their systems of revenue and taxa-

In re McCrary Bros. (D. C.) 169 Fed. 485; In re Wood (D. C.) 147 Fed. 877; In re Stone (D. C.) 116 Fed. 35.

[160] In re Beauchamp (D. C.) 101 Fed. 106; In re Stevenson (D. C.) 93 Fed. 789; In re Camp (D. C.) 91 Fed. 745.

[161] Richardson v. Woodward, 104 Fed. 873, 44 C. C. A. 235.

[162] First Nat. Bank v. Glass, 79 Fed. 706, 25 C. C. A. 151.

[163] Thompson v. McConnell, 107 Fed. 33, 46 C. C. A. 124.

tion, and the construction and interpretation of the laws regulating these subjects are so essentially a matter of local law that the courts of the United States are imperatively bound to follow the adjudications of the highest court of the state.[164] It is of course familiar knowledge that the constitutional validity of state laws imposing taxes is frequently challenged on the ground of their depriving the citizen of his property without due process of law or denying him the equal protection of the law, on the ground that they constitute an unlawful interference with foreign or interstate commerce, or on the ground that they impair the obligation of contracts. All questions of this kind are "federal questions," and their solution will be attempted by the federal courts without being bound or limited in any way by the decisions in the particular state.[165] But it is otherwise if the federal question involved in the case has been eliminated by the decision of the state court. Thus, if a state law imposing a tax on "every meat-packing house doing business in this state" were applied to a foreign corporation doing business in the state both of a local character and also in the way of shipments beyond the state, it might be held unlawful as an attempt to restrict interstate commerce. But if the supreme court of the state has decided that the statute does not apply to the interstate business of such a company, but only to its local business, this interpretation of the law will be accepted by the United States courts and thus the possible federal question will be eliminated.[166]

[164] Games v. Stiles ex dem. Dunn, 14 Pet. 322, 10 L. Ed. 476; Rice v. Jerome, 97 Fed. 719, 38 C. C. A. 388; Van Gunden v. Virginia Coal & Iron Co., 52 Fed. 838, 3 C. C. A. 294; Singer Mfg. Co. v. Adams, 165 Fed. 877, 91 C. C. A. 461; Hager v. American Nat. Bank, 159 Fed. 396, 86 C. C. A. 334; Parks v. Watson (C. C.) 20 Fed. 764; Secor v. Singleton (C. C.) 9 Fed. 809; Hodgdon v. Burleigh (C. C.) 4 Fed. 111; Kountze v. City of Omaha, 5 Dill. 443, Fed. Cas. No. 7,928.

[165] John Kyle Steamboat Co. v. City of New Orleans, Fed. Cas. No. 7,354; Olcott v. Fond du Lac County Sup'rs, 16 Wall. 678, 21 L. Ed. 382.

[166] Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

As regards the validity of a statute (or a municipal ordinance) as tested by the requirements of the state constitution, the matter is absolutely one for the determination of the state courts, whose conclusions will be accepted without question by the federal courts.[167] Thus, the decision of the highest court of a state that a tax is "uniform," within the meaning of a requirement in the constitution of the state, when it bears equally upon all persons belonging to the prescribed class on which it is imposed, is not open to review by the Supreme Court of the United States on writ of error to the state court.[168] And so, where a statute includes provisions for the taxation of real property which had escaped taxation for previous years, and also provisions for the taxation of personal property under the same circumstances, in the same section, and the latter part is held to be unconstitutional, there arises the further question whether the legislature regarded the two provisions as so mutually related and interdependent that the section must stand or fall as a whole; and this question is one to be determined finally by the state court, and its conclusion will be adopted by the United States courts without independent consideration of it.[169]

Similar rules prevail as to almost all questions which may be presented to the courts concerning the nature of the particular imposition and the procedure for its enforcement and collection. For instance, in determining whether a charge or mulct imposed by a state statute upon liquor sellers is a "tax," within the meaning of that term as used in the bankruptcy act, the federal court will follow the decisions of the highest court of the state construing the statute.[170] So of the question whether a particular charge imposed by law is a license or occupation tax or a tax on

[167] Treat v. City of Chicago, 130 Fed. 443, 64 C. C. A. 645; Flanigan v. Sierra County, 122 Fed. 24, 58 C. C. A. 340.

[168] Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

[169] Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247.

[170] In re Ott (D. C.) 95 Fed. 274.

property.[171] It is also a question for the exclusive determination of the state court whether a particular taxing law or ordinance is still in force or has been repealed,[172] and in the latter case, the effect of the repeal on pending proceedings for the collection of the tax.[173] So also of the questions raised by the claim of an individual or corporation to be exempt from taxation, wholly or in part. Whether such an exemption exists, whether it is repealable, whether it has been in fact repealed, to what property it extends, whether it may be claimed as against certain special or peculiar forms of taxation,—these are questions which, when they come before a federal court, will be decided in accordance with the rulings of the state courts, if any decisive adjudications have been made.[174] So again, the determination of the supreme court of a state as to whether a statute imposing a license tax is sufficiently certain in its terms to enable those charged with its enforcement to ascertain definitely the amount of the tax, is conclusive on the federal supreme court.[175] And so also of the question of the extent and incidents of a tax lien,[176] and of the construction of the statute with reference to deductions to be made by the taxpayer in listing his property.[177] On the same principle, a decision by the highest court of the state that, under the statutes of the state, an application for relief to the county board of equalization is the exclusive remedy for an erroneous exercise of the taxing power, except in cases of fraud, is binding on the fed-

[171] Brown-Forman Co. v. Commonwealth of Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883.

[172] Adams v. City of Nashville, 95 U. S. 19, 24 L. Ed. 369.

[173] Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597.

[174] Arkansas Southern Ry. Co. v. Louisiana & A. Ry. Co., 218 U. S. 431, 31 Sup. Ct. 56, 54 L. Ed. 1097; Wicomico County Com'rs v. Bancroft, 203 U. S. 112, 27 Sup. Ct. 21, 51 L. Ed. 112.

[175] Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586.

[176] Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242.

[177] Commercial Nat. Bank v. Chambers, 182 U. S. 556, 21 Sup. Ct. 863, 45 L. Ed. 1227.

eral courts.[178] And so of a decision in regard to the authority of the state board of equalization to levy taxes,[179] and of a ruling that the law of the state requires the collection and payment of taxes to be made in gold and silver coin.[180] Again, questions as to the validity of a tax deed, arising either on a consideration of the regularity and effect of the proceedings for the collection of the tax, or on the form and efficacy of the deed itself, are matters peculiarly within the jurisdiction of the states, and the decisions of the state courts thereon will be followed by the federal courts.[181]

In this connection, however, it is necessary to distinguish between the effect of a decision as res judicata and its effect as establishing a general rule or principle of law applicable to similar cases in the future. For example, where a corporation sets up the claim that its charter entitles it to exemption from municipal taxation on its capital stock, and its contention is sustained by the courts of the state, the decision would generally be held to be res judicata only as to the identical taxes litigated in that suit, not as to those of a subsequent year. And where this is the local rule, the judgment cannot be accorded any greater effect in the federal courts, as an estoppel, than would be given to it in the state courts.[182] On the other hand, where a plaintiff in a federal court claims relief on the ground of the invalidity, under the statutes of the state, of certain tax proceedings, and the identical proceedings had been adjudged valid by the supreme court of the state, though not in such a form as to render the matter technically res judicata, because not in a suit between the same parties, nevertheless its decision will be held binding on the federal

[178] Altschul v. Gittings (C. C.) 86 Fed. 200.

[179] Paine v. Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303.

[180] Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101.

[181] Bardon v. Land & River Improv. Co., 157 U. S. 327, 15 Sup. Ct. 650, 39 L. Ed. 719; Lewis v. Monson, 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265; Coleman v. Peshtigo Lumber Co. (C. C.) 30 Fed. 317.

[182] Union & Planters' Bank v. City of Memphis, 189 U. S. 71, 23 Sup. Ct. 604, 47 L. Ed. 712.

court, because it is an authoritative construction of the statutes of the state.[183]

EMPLOYER'S LIABILITY LAWS

178. In so far as the reciprocal rights and liabilities of master and servant have been made the subject of statutory enactment in a given state, questions relating thereto, and depending on the construction or application of the statute, will be governed by the decisions of the highest court of the state, to which the federal courts will conform.

Questions of liability for negligence or other torts, of the liability of an employer for torts committed by his servants, of the responsibility of an employer to his servants for injuries suffered at the hands or through the acts or neglect of their co-employees, of the defense of contributory negligence in such cases, or of the doctrine of comparative negligence, may be regulated by the statutes of the particular state. In the absence of any such statute, these are questions of general law; and in so far as the rights and responsibilities of persons in cases of this kind are left to be governed by the common law, the courts of the United States are free to work out their own conclusions, irrespective of the decisions of the courts of the state in which they sit. But if matters of this kind have been taken up into the written law of the particular state, and are regulated by its statutes, as is now often the case, they become a part of its peculiar or "local" law, and the construction put upon such statutes by the highest court of the state furnishes a binding rule for the decision of similar cases by the courts of the United States, irrespective of their own rulings on the common law of the subject or of the principles prevailing in any other state.[184] But

[183] Haley Live-Stock Co. v. Board of Com'rs of Routt County, 94 Fed. 297, 36 C. C. A. 350.

[184] Pennsylvania Steel Co. v. Lakkonen, 181 Fed. 325, 104 C. C. A. 513; Atlantic Coast Line R. Co. v. Dunning, 166 Fed. 850, 94

it is only when the statute is a new and distinct enactment on the subject that this rule prevails, not where it is merely in affirmance or declaratory of the common law. Thus, in a case in Tennessee, the supreme court of that state held that a statute of the state relating to the recovery of damages for injuries causing death did not create a new liability, but merely continued the decedent's cause of action by abrogating the common-law rule abating personal actions on the death of the plaintiff. Acting on this suggestion,—that the liability was not created, but merely preserved, by the statute,—the federal court held that a decision of the supreme court of Tennessee, in an action for wrongful death, that the conductor of a railroad train was a vice principal, and not a fellow servant of the brakeman, did not define a statutory liability so as to be binding on the federal courts as a construction of a state statute.[185]

C. C. A. 128; United States Leather Co. v. Howell, 151 Fed. 444, 80 C. C. A. 674; Crosby v. Lehigh Valley R. Co. (C. C.) 128 Fed. 193; Dormidy v. Sharon Boiler Works (C. C.) 127 Fed. 485; Peirce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; Central Trust Co. v. East Tennessee, V. & G. Ry. Co. (C. C.) 69 Fed. 353; Northern Pac. R. Co. v. Hogan, 63 Fed. 102, 11 C. C. A. 51; United States v. Boomer, 183 Fed. 726, 106 C. C. A. 164.

[185] Elliott v. Felton, 119 Fed. 270, 56 C. C. A. 74.

CHAPTER XV

SAME; FEDERAL QUESTIONS

179. General Rule.
180. Construction of Acts of Congress.
181. Federal Corporations.
182. Jurisdiction and Powers of Federal Courts.
183. Criminal Law.
184–186. Obligation of Contracts.
187. Due Process of Law.

GENERAL RULE

179. In cases presenting a claim or defense founded on the Constitution of the United States or a national treaty or an act of Congress, or which involve the construction of either, the federal courts are not bound to follow the decisions of any state court, but on the contrary will base their determinations on their independent judgment, guided and fortified by their own previous rulings and those of courts having authority over them.

Just as the courts of the United States concede to the highest judicial tribunals of the several states the right to place a final and authoritative interpretation upon the constitutions and laws of their respective states, so they claim for themselves the exclusive authority to determine the rules and principles of law which shall govern the interpretation and application of national law. To them is committed by the organic law the judicial power to determine "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority"; and wherever a claim or defense, a right, privilege, or immunity, is alleged to exist under the laws of the Union, their jurisdiction may be invoked. Hence the interpretation and application of federal law is the peculiar and appropriate function of the federal courts, and one in the exercise of which

they are not to be controlled by the adjudications of the state courts any more than by enactments of the state legislatures. Besides, there is nothing local in the scope of the federal constitution and laws, nor in their application to particular controversies. They are operative in all the states alike and upon all citizens without regard to state lines. For the sake of uniformity, then, if for no other reason, it is essential that their authoritative construction should be committed to one homogeneous system of courts. It would be intolerable if rights and liabilities arising under an act of Congress, for example, should take on a different complexion in one state from that which they wear in another, simply because the courts of the two states differed in regard to them and the federal courts simply deferred to their variant decisions, or if, for the same reason, a privilege or immunity under the federal constitution could be successfully claimed in one state but not in another. It is therefore a settled rule that the courts of the United States will not be constrained to follow the decisions of the courts of the state in which they sit, or in which the controversy originated, upon any question arising under the federal constitution or a treaty or an act of Congress, or involving the construction or application of either.[1] In such a case, an applicable decision of the state court will indeed be treated with due consideration, but not as foreclosing independent judgment, and the only precedents having a controlling force are decisions previously made by the same federal court or by one having appellate jurisdiction over it. In the case of an inferior federal court, however, where the question presented to it has not yet been determined by the Supreme Court of the United States, it may be proper to defer action or refuse affirmative relief if its own opin-

[1] Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; Piqua Branch of State Bank of Ohio v. Knoop, 16 How. 369, 14 L. Ed. 977; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. Ed. 173; Sunset Telephone & Telegraph Co. v. Pomona (C. C.) 164 Fed. 561; Johnson v. Crawford & Yothers (C. C.) 154 Fed. 761; Central Trust Co. v. Citizens' St. Ry. Co. of Indianapolis (C. C.) 82 Fed. 1.

ion on the merits is very strongly controverted by a judgment of the highest court of the state where it sits. On this ground, a ruling was once made that a prisoner should not be discharged on habeas corpus by a United States circuit court, where the question of law involved, though arising under the constitution and laws and treaties of the United States, is a doubtful one as between the circuit court and the supreme court of the state, there being an immediate appeal allowed to the Supreme Court of the United States.[2]

The general rule under consideration has sometimes been stated in this way: That the statute providing that the laws of the several states shall be regarded as rules of decision by the federal courts in trials at common law in cases where they apply is restricted to cases in which the jurisdiction is based upon the diverse citizenship of the parties, and does not apply where jurisdiction attaches because a federal question is involved.[3] But this statement is not broad enough to cover all possible cases. For it may very well happen that a question under the federal constitution or laws shall be involved in an action brought in a federal court by a citizen of one state against a citizen of another. For instance, the question whether or not a statute of a state is valid, when tested by the requirements and prohibitions of the federal constitution, is always a federal question, no matter on what circumstances the jurisdiction of the federal court in the particular case may have been based; and in deciding this question the federal courts are not in any way bound by the decisions of the state courts.[4] As to this point, however, it should be remarked that the construction placed upon an act of a state legislature by the highest court of the state will ordinarily be accepted as correct by the Supreme Court of the United States, when determining whether the statute, as so interpreted, denies the equal protection of the laws or violates any other provi-

[2] In re Wo Lee (C. C.) 26 Fed. 471.

[3] Schreiber v. Sharpless (D. C.) 17 Fed. 589.

[4] Dundee Mortgage Trust Inv. Co. v. School Dist. No. 1, Multnomah Co. (C. C.) 19 Fed. 359; Knight v. Shelton (C. C.) 134 Fed. 423.

sion of the constitution.[5] But note that the decision of the supreme court of a state upon the question whether a law imposing a license is enacted under the police power of the state or under the power of taxation, is not conclusive upon a federal court, when the validity of the statute, as measured by the federal constitution and laws, depends upon the solution of this very question, as where the license relates to intoxicating liquors imported into the state, and would be valid if regarded as a police regulation, but void for interfering with interstate commerce if treated as an exercise of the taxing power.[6] Again, the fact that a judgment in the state court in res judicata of the questions litigated, in an action removed to the federal court because of a federal question being involved, does not deprive the latter court of jurisdiction, though the judgment of the state court is conclusive on the parties, since it merely has the effect of evidence, and does not remove consideration of the laws of the United States as elements of the decision.[7]

CONSTRUCTION OF ACTS OF CONGRESS

180. In the construction and application of acts of Congress, the federal courts are not required to follow the decisions of any state court, the only precedents of controlling authority being those made by the Supreme Court of the United States.

Federal statutes must be interpreted by the federal courts, independently of all local considerations and local decisions, and an act of Congress cannot be said to have an established meaning, whatever the decisions of other courts may have been, until it has been construed by the Supreme Court of the United States.[8] Very often such a question

[5] National Cotton Oil Co. v. Texas, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689.

[6] Pabst Brewing Co. v. City of Terre Haute (C. C.) 98 Fed. 330.

[7] Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 62 Fed. 945.

[8] Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200.

must be decided by a state court in advance of any ruling by the supreme federal tribunal, but its determination, in such a case, does not constitute a precedent that is binding on any court of the federal system, nor even a precedent, in the strictest sense, for its own future action. Thus, it has been said by the court in Colorado that the doctrine of stare decisis is based upon the assumption that the rules of law to which the doctrine applies have previously been determined by a court having final jurisdiction of the questions involved; and hence it does not apply with full force to a previous decision of the supreme court of a state on a question involving an act of Congress, when that question has not been determined by the United States Supreme Court.[9]

The general rule may be illustrated by cases arising under the bankruptcy act. The federal courts, in construing this statute, are not in any way bound to follow the decisions of a state court on the interpretation of similar provisions in a state insolvency law.[10] The question of the effect of the bankruptcy act upon the validity of a general assignment made after its passage, in accordance with the provisions of a state statute, is not one which is governed by any rule of decision in the state, because the question here is upon the construction of the bankruptcy law, not of the state statute.[11] On the other hand, a decision by the supreme court of a state, that a statute of that state regulating the administration and distribution of estates under general assignments for creditors is an insolvency law, will be followed by the federal courts of bankruptcy in deciding upon the effect of the enactment of the national bankruptcy law upon the operation of such statute, because the question here is as to the character and meaning of the state statute, which is for the decision of the state court.[12] But whether a state statute authorizing the arrest of a judg-

[9] Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17.

[10] In re Knight, 2 Biss. 518, Fed. Cas. No. 7,880.

[11] In re Plotke, 104 Fed. 964, 44 C. C. A. 282.

[12] In re Curtis (D. C.) 91 Fed. 737, affirmed 94 Fed. 630, 36 C. C. A. 430.

ment debtor on certain grounds, after the return of an execution unsatisfied, has been superseded by the bankruptcy law is a federal question, as to which the decisions of the state courts are merely advisory.[13] Again, as was pointed out in another place,[14] the bankruptcy law leaves the matter of the bankrupt's exemptions to be regulated by the state law, and the bankruptcy courts will follow and accept the decisions of the courts of the state as to the meaning and construction of the state exemption law, because this is a matter of local law. But if the particular point has not been ruled by the state court, the federal court will proceed to determine it in the exercise of its independent judgment. In one such case it was said: "The courts of Virginia have not considered or decided the question involved in the case at bar. These courts have construed the constitution and statutes referred to, but not as bearing upon or involved in this question of homestead exemptions. Had they done so, this court would follow their interpretation. In the absence of such decisions, this court must determine the claim of the bankrupt to exemptions, not upon any supposition of how the state courts would probably decide, but according to established rules of construction." [15] So also as to the acts of Congress authorizing the removal of causes from state courts to federal courts in certain cases. A federal court is not bound by the decision of the supreme court of the state in which it sits that, to entitle a defendant to remove the cause, he must first file his pleadings in the state court, because the question is one involving the construction of the act of Congress and not a state law.[16] So a decision by the state court of last resort that a special proceeding under the state laws is not a civil suit is not controlling on the federal court, on the question whether the proceeding is "a civil suit at law or in equity" within the meaning of the removal acts.[17] Again, questions relating

[13] Johnson v. Crawford & Yothers (C. C.) 154 Fed. 761.
[14] Supra, p. 586.
[15] Richardson v. Woodward, 104 Fed. 873, 44 C. C. A. 235.
[16] Egan v. Chicago, M. & St. P. Ry. Co. (C. C.) 53 Fed. 675.
[17] In re Jarnecke Ditch Co. (C. C.) 69 Fed. 161.

to the right of set-off in the federal courts arise exclusively under the acts of Congress, and no local law or usage can have any influence in their determination, for the rules established must be uniform throughout the Union.[18]

FEDERAL CORPORATIONS

181. Questions concerning the rights, powers, duties, and liabilities of corporations chartered by Congress or organized under the laws of the United States are "federal questions," as involving the construction of federal statutes, in such sense that the courts of the United States are not controlled in their decision by the rulings of the state courts.

It is firmly settled that any corporation created and organized under an act of congress, or deriving its corporate powers and existence from congressional legislation (with the special exception of the national banks), is entitled to remove to a federal court any suit brought against it in a state court, on the ground that such suit is one arising under the laws of the United States.[19] And on the same ground, any question of the powers, rights, duties, or liabilities of such a corporation would be regarded as one for the exclusive determination of the federal courts, uninfluenced by the decisions of the state courts. For even if the question concerned the application to such a company of a statute enacted by a state, it would involve a consideration of the limits of the rightful authority of the state governments in their dealings with federal corporations, or a construction of the acts of Congress by which the company was created or governed. Or if the rule of law to be

[18] United States v. Robeson, 9 Pet. 319, 9 L. Ed. 142; Watkins v. United States, 9 Wall. 759, 19 L. Ed. 820.

[19] Union Pac. Ry. Co. v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. And see, further, Black's Dillon on Removal of Causes, § 127.

established were one equally applicable to all corporations of the same class or engaged in the same business, without regard to local enactments, the question would be regarded by the federal courts as one of "general law," as to which (as will appear more fully in another place) they hold themselves free from any obligation to conform to the rulings of the state courts. These principles are illustrated by a judgment of the United States Supreme Court holding that decisions by a state court, in cases involving railroad corporations created by the state, to the effect that the construction and maintenance of railroads does not constitute a public purpose such as will authorize municipal donations in aid thereof under the constitution of the state, are not binding on the federal courts, in a case involving a railroad company created by the laws of the United States, and subjected by its charter to important public duties, such as becoming a postal route and military road and a means of interstate commerce; especially when the state legislature has declared that, for the purposes set forth in the acts of Congress under which the company was organized, it should be vested within the state with all its rights, powers, privileges, and immunities given by the acts of Congress.[20]

JURISDICTION AND POWERS OF FEDERAL COURTS

182. Questions concerning the jurisdiction and powers of the courts of the United States are to be decided by those courts exclusively, neither the statute law of a state nor the judicial decisions of its courts being of controlling authority.

An act of Congress provides that "the practice, pleadings, and forms and modes of procedure in civil causes, other than admiralty and equity causes, in the circuit and

[20] Roberts v. Northern Pac. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of procedure existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."[21] But this statute relates only to matters of procedure, and does not in any way affect the jurisdiction of the federal courts.[22] That jurisdiction is prescribed and limited by the Constitution of the United States and the various acts of Congress, and the incidental and ancillary powers of those courts, not specifically covered by statute, are derived from those principles of the common law which are applicable to all courts of record. Neither can be to any extent abridged or curtailed by the legislative enactments of any state. Hence it follows that the federal courts alone are competent to decide finally upon the nature and scope of their jurisdiction and their judicial powers. Decisions of the state courts upon their own authority in similar cases may indeed be instructive or persuasive, but they are not necessarily to be followed as precedents. And although it is an admitted general rule that the construction of the constitution or laws of a state by the highest court of the state is binding on the federal courts, yet this does not apply where such construction affects the jurisdiction of a federal court, but the latter is under the duty of determining such matter for itself.[23] Thus, a state statute prohibiting suits against tax collectors in certain circumstances cannot be invoked to defeat the jurisdiction of a federal court in such a case, provided the amount in controversy and the diversity of citizenship of the parties are such as to satisfy the requirements of the act of Congress.[24] The same is true of a statute which forbids unqualified foreign corporations doing business in the state from suing in the courts of the state; this does not affect their right to sue in the federal courts.[25]

[21] Rev. St. U. S. § 914 (U. S. Comp. St. 1901, p. 684).

[22] Wells v. Clark (C. C.) 136 Fed. 462.

[23] United States v. Tully (C. C.) 140 Fed. 899.

[24] Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185.

[25] Johnson v. City of St. Louis, 172 Fed. 31, 96 C. C. A. 617.

And so, a state statute providing that, on the death of a defendant in a pending action, the plaintiff must present his claim to the executor or administrator for allowance or rejection, and that no recovery shall be had in the action without proof of such presentation, is not made applicable, by the act of Congress above referred to, to an action by the United States in a federal court against a surety on the bond of an officer, where the surety dies pending the suit, since laches cannot be imputed to the government, nor can its rights in a governmental matter, prescribed by its own statutes, be affected by state enactments.[26] For similar reasons, recourse cannot be had to a state statute to determine whether or not a cause of action given by a federal statute survives.[27]

The same rule applies to the various proceedings incidental to the progress of an action, and to the validity and effect of process, mesne and final. Thus, although the institution of proceedings under a state insolvency law has the effect, by the state statute, of dissolving existing attachments, it does not have this effect on an attachment issued from a federal court, since the legislative authority of a state cannot, by its enactments, affect the validity of process in the United States courts.[28] So also, a federal court has jurisdiction to declare void a fraudulent assignment, notwithstanding the special provisions of a state statute as to setting aside assignments made by a debtor in contemplation of insolvency, and it can direct the application of the fund assigned.[29] Again, the question whether a return of substituted service of process in federal courts can be amended is a question of the power of the court, with reference to which it is not bound by the decisions of the state courts.[30] Again, state laws holding that a judgment by default in an action of contract for a fixed sum is merely interlocutory and not final, and postponing the lien of such judgment to a deed made after its rendition but before the

[26] Pond v. United States, 111 Fed. 989, 49 C. C. A. 582.
[27] Walsh v. New York, N. H. & H. R. Co. (C. C.) 173 Fed. 494.
[28] Springer v. Foster, 1 Story, 601, Fed. Cas. No. 13,265.
[29] Burt v. Keyes, 1 Flip. 61, Fed. Cas. No. 2,212.
[30] King v. Davis (C. C.) 137 Fed. 198.

affirmance of the judgment by the court, are not binding on the courts of the United States, when the question concerns the effect of such a judgment rendered by a United States circuit court.[31] So, in another case, it was determined by a state court that, where a railway company gave a mortgage covering all its property and franchises, and the mortgage was foreclosed by a decree in an action in a federal court and the property sold, the property remained liable after the sale for debts thereafter accruing against the mortgagor company, because of the failure of the purchaser to organize a domestic corporation to take over and carry on the business. But the Supreme Court of the United States, in a proceeding where it was necessary for it to determine the rights secured by the purchaser under such decree, held that it was not concluded by this decision.[32] For similar reasons, and also because the matter is one of equity jurisprudence, a state statute authorizing the appointment of receivers, and defining their powers and duties and regulating their proceedings, has no applicability to receivers appointed by the federal courts.[33]

CRIMINAL LAW

183. Decisions of the state courts have no authority as precedents for the United States courts in the trial of criminal offenses.

There can be no common-law offenses against the United States. The general government has no power to punish any act as a crime unless it is made such by the constitution or by an act of Congress.[34] And not only this, but the federal criminal jurisprudence is entirely destitute of any sub-

[31] Clements v. Berry, 11 How. 398, 13 L. Ed. 745.

[32] Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629.

[33] Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305.

[34] United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; United States v. Hudson, 7 Cranch, 32, 3 L. Ed. 259.

stratum of a common law of crimes, upon which to draw for supplying elements of the offense. For this the courts look only to the statute. They may resort to the common law for the definition of crimes created by statute, or for the explanation of terms used in the constitution or acts of Congress (such as "trial by jury," "infamous crime," "jeopardy," "due process of law," and the like), but never for any ingredient of the offense.[35] Hence it follows that, the criminal law of the United States being entirely statutory, all questions arising in its administration must involve the construction or application of the constitution or of an act of Congress, and therefore must fall within the category of "federal questions," as to which the courts of the United States are not bound to follow the adjudications of the state courts, but must decide independently for themselves. Nor does the act of Congress which makes the laws of the several states rules of decision in the courts of the United States in trials at common law have any application to the trial of criminal offenses.[36] But of course, in cases where it is necessary to resort to the common law for the explanation of terms used in the criminal statutes, these courts may often derive much assistance from the decisions of state courts construing similar language in their own statutes.

OBLIGATION OF CONTRACTS

184. In considering the validity of a state law which is alleged to impair the obligation of contracts, the federal courts will determine for themselves, independently of any decisions of the state courts, whether a contract exists and whether its obligation has been impaired.

185. The construction and interpretation of a state law, as fixing its meaning, scope, and applicability, and as preliminary to the question of its validity, will

[35] United States v. De Groat (D. C.) 30 Fed. 764.

[36] United States v. Central Vermont Ry. (C. C.) 157 Fed. 291; United States v. Burr, Fed. Cas. No. 14,694.

generally be governed by the decisions of the highest court of the state, if any exist.

186. Where contracts have been made and rights vested under decisions as to the validity or construction of a state statute, made by the highest court of the state, or by the federal courts in the absence of such decisions, the latter courts will not follow the state courts in a change of opinion which would retroactively invalidate such contracts or rights.

The consideration of the constitutional validity of a state statute which is assailed on the ground that it impairs the obligation of a contract or contracts very certainly raises a "federal question," since it arises directly under the clause in the Constitution of the United States relating to that subject. In inquiries of this kind the federal courts cannot surrender their judgment and be governed by the decisions of the state courts, since to do so would amount to an abdication of their jurisdiction. A controversy of this kind almost always involves two main or principal questions, first, whether a "contract" exists, within the meaning of the constitutional prohibition, and second, whether the act in question impairs its obligation. On these two questions, the courts of the United States are under no kind of obligation to follow the rulings of the state courts in the same or similar cases. On the contrary, it is their duty to exercise their independent judgment, the only binding precedents being the determinations of the Supreme Court of the United States on identical questions.[87] The first of the two questions mentioned may assume an aspect of great importance and difficulty when the alleged contract consists in, or rests upon, a previous statute of the state, as, where it involves a legislative grant of franchises, privileges, exemptions, or immunities to corporation or individuals, which

[87] Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. Ed. 173; McCullough v. Virginia, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; Sunset Telephone & Telegraph Co. v. City of Pomona (C. C.) 164 Fed. 561.

may or may not be contractual in their nature, and a subsequent statute, repealing or curtailing them, is claimed to have been enacted in the exercise of the police power or some other high prerogative of sovereignty. It is in such cases especially that we perceive the wisdom of establishing a system of national courts particularly charged with the exposition and application of the national constitution and laws. And the necessity of their being entirely free from any controlling force, as respects the decisions of the courts of the state immediately interested, or even from any influence exerted by such decisions, must be self-evident. In all such cases, the federal courts have firmly asserted their right to the exercise of an absolutely independent judgment.[38]

Yet an unseemly conflict of authorities is to be avoided when possible, and concurring decisions, in cases of great doubt or difficulty, are much to be desired. Accordingly the Supreme Court of the United States has declared that, although it is its duty to exercise an independent judgment as to the nature and scope of a contract, when its jurisdiction is invoked because of the alleged impairment of contract rights arising from the effect given to subsequent legislation, nevertheless, when the contract said to have been impaired is based upon a state statute, the federal court, for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the state courts, if the question seems balanced with doubt.[39] And the rule stated applies only in respect to questions of law or legal conclusions, and where the question is as to giving effect to prior decisions as precedents. Where a prior judgment of a state court is set up, not as a precedent, but as a technical estoppel on the principle of res judicata, the matter is altogether different, and the judgment must be accorded the full measure of faith and credit which is due to it.[40]

[38] Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921; Citizens' Sav. Bank v. City of Owensboro, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. Ed. 840.

[39] Board of Liquidation of City Debt v. Louisiana ex rel. Wilder, 179 U. S. 622, 21 Sup. Ct. 263, 45 L. Ed. 347.

[40] Stone v. Bank of Kentucky, 174 U. S. 799, 19 Sup. Ct. 881, 43 L. Ed. 1187.

Again, the question of the interpretation of a state statute may precede the question of its validity. In other words, it may be necessary first to determine the meaning or scope of a doubtful or ambiguously worded statute, or its applicability to the given state of facts or set of circumstances, before it can be determined whether it creates a contract, in the constitutional sense, or impairs the obligation of an existing contract. And as the interpretation of state laws is the appropriate function of the courts of the state, their construction of the statute in question will ordinarily be followed. The statute will be understood in the federal courts to mean what the highest court of the state has declared it to mean, and to apply to cases to which the state court holds it applicable,[41] and the open question in the federal court (where it is not bound to follow adjudications of the state court) will then be, does the statute, as thus interpreted, create a contract, or impair the obligation of a contract, as the case may be? An interesting example of the application of this rule is found in a case in the federal court in California, where the question concerned certain rights claimed by a telephone company, which were based on a statute of the state and were asserted to be contractual in their nature, so as to be protected from subsequent impairment by the state. The supreme court of the state had construed the statute, which related to "telegraph companies," as including telephone companies; and this construction was followed by the federal court.[42]

Contract rights may also be impaired by the retroactive effect of judicial decisions reversing the construction of the statute on which they were based, or revoking the court's former determination as to its constitutionality. But the federal courts will protect contracts from impairment in this way, so far as it lies within their jurisdiction, and to the extent that they will refuse to be bound by such later

[41] **Mead v. City of Portland, 200 U. S. 148, 26 Sup. Ct. 171, 50 L. Ed. 413; Powers v. Detroit, G. H. & M. Ry. Co., 201 U. S. 543, 26 Sup. Ct. 556, 50 L. Ed. 860. But compare Butz v. City of Muscatine, 8 Wall. 575, 19 L. Ed. 490.**

[42] **Sunset Telephone & Telegraph Co. v. City of Pomona, 172 Fed. 829, 97 C. C. A. 251.**

decisions of the state courts. To state the rule more specifically, if contracts have been entered into and rights have vested on the faith of a decision of the highest court of the state sustaining the validity of a statute on which they depend, or construing it in a particular way,—or on the faith of a decision of the federal courts, in the absence of any authoritative declaration of the state courts at the time,—and afterwards the highest court of the state renders a decision of a contrary tenor to its former rulings, or reaches a conclusion different from that already announced by the federal courts, the latter courts are not bound to follow the state court in its change of opinion, and will not do so where the effect would be to impair such existing contracts or destroy such vested rights.[48]

DUE PROCESS OF LAW

187. Whether any proceedings by which the citizen is deprived of liberty or property, or the laws on which they are founded, constitute due process of law, is a federal question, upon which the courts of the United States are not bound to follow the decisions of the state courts.

It has been quite recently decided—but the principle is not new—that on a writ of error to review the judgment of the highest court of a state, on the ground that the judgment was given against a right claimed under the Constitution of the United States, the supreme federal court is not bound by the state court's construction of a statute of the state, when the question is whether or not the statute provided for the notice required to constitute due process of

[48] Rowan v. Runnels, 5 How. 134, 12 L. Ed. 85; Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C.) 131 Fed. 890; Westinghouse Air-Brake Co. v. Kansas City Southern Ry. Co., 137 Fed. 26, 71 C. C. A. 1; Great Southern Fireproof Hotel Co. v. Jones, 116 Fed. 793, 54 C. C. A. 165; Jones v. Great Southern Fireproof Hotel Co. (C. C.) 79 Fed. 477.

law.[44] And again, state laws cannot determine for the national courts what constitutes sufficient process of law, or sufficient service of process, or sufficient appearance of parties, but they must exercise their independent judgment in deciding these questions, notwithstanding the provision of the federal constitution regarding the giving of full faith and credit to the judgments of state courts.[45] So also, the federal courts are not bound by decisions of state courts of last resort that uses for which private property is to be taken under state legislation are public uses, so that the appropriation of the property of the individual for such purposes will not be in violation of the federal constitution.[46]

[44] Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.
[45] Michigan Trust Co. v. Ferry, 175 Fed. 667, 99 C. C. A. 221.
[46] Bradley v. Fallbrook Irrigation Dist. (C. C.) 68 Fed. 948.

CHAPTER XVI

SAME; COMMERCIAL LAW AND GENERAL JURISPRUDENCE

188. General Rule.
189. Commercial Law.
190. General or Common Law.
191. Validity and Construction of Contracts.
192. Liability for Negligence or Other Torts.
193-194. Law of Master and Servant.
195. Public Policy.
196. International Law.
197. Conflict of Laws.

GENERAL RULE

188. In the determination of questions which are not governed by the local or statutory law of a state, but belong to the field of general commercial law or general jurisprudence, the federal courts exercise their independent judgment, and are not bound to follow the decisions of the courts of the state in which they sit or in which the action originated.

This rule is very firmly established in the jurisprudence of the federal courts.[1] And while it has been severely criticized, and its existence often deplored, yet they have ad-

[1] Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; Thompson v. Perrine, 103 U. S. 806, 26 L. Ed. 612; Roberts v. Bolles, 101 U. S. 119, 25 L. Ed. 880; Town of Venice v. Murdock, 92 U. S. 494, 23 L. Ed. 583; Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298; Boyce v. Tabb, 18 Wall. 546, 21 L. Ed. 757; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Pennsylvania R. Co. v. Hummel, 167 Fed. 89, 92 C. C. A. 541; Leyner Engineering Works v. Kempner (C. C.) 163 Fed. 605; Converse v. Mears (C. C.) 162 Fed. 767; In re Hopper-Morgan Co. (D. C.) 154 Fed. 249; Malloy v. American Hide & Leather Co. (C. C.) 148 Fed. 482; Phœnix Bridge Co. v. Castleberry, 131 Fed. 175, 65 C. C. A. 481; Independent School Dist. of Sioux City, Iowa, v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Union Bank of Richmond v. Board of Com'rs of Oxford (C. C.) 90 Fed. 7; Willis v. Board of Com'rs of Wyandotte County, 86 Fed. 872, 30 C. C. A. 445.

hered to it so steadily and for so long a period of time that it must now be regarded as an unalterable principle. Though it was tacitly assumed, and generally acted on, almost from the foundation of the government, yet it did not assume its present sharp and definite outlines until 1842. In that year the leading case of Swift v. Tyson [a] was decided, wherein it was said: "In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section [of the Judiciary Act of 1789 (1 Stat. 92, c. 20)] limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts or other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of

[a] 16 Pet. 1, 10 L. Ed. 865.

this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burrows, 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world."

We have said that this rule has been severely criticised. In truth its existence and enforcement have given rise to no little bitterness and jealousy; and the foundations upon which it is supposed to rest have been rudely shaken by some eminent courts and judges. The only valid argument in its support is that if the courts of the United States were left free to work out for themselves a consistent and definite body of rules and principles applicable to the general field of what is sometimes called "commercial law" or "general jurisprudence," and if the courts of the various states would unanimously agree to accept and follow the rulings of the federal courts on such subjects, as they do in regard to questions arising under the federal constitution and laws, there would be established a uniform system of jurisprudence on these matters applicable throughout the entire country and free from all local variations and idiosyncrasies. That this course should be pursued by the state courts has sometimes been quite strongly urged, for this reason, by the state courts themselves.[3] But such an attitude is exceptional. For the most part, the chief courts of the states have been stubborn in insisting on their right to decide for themselves all questions growing out of the common law or mercantile law, that is, all questions not distinctly of a federal character, just as the United States courts have been stubborn in claiming the privilege, and even the duty, of determining such questions according to their own independent judgment.

The arguments against the rule under consideration may be summarized as follows: In the first place, there is no such thing as a general commercial "law." Nothing can be a law of the United States unless embodied in its con-

[3] See Treon v. Brown, 14 Ohio, 482.

stitution, treaties, or statutes. No rule can have the force of law in a state unless declared in its constitution, enacted by its legislature, announced by its courts, or existing within its borders as a fixed and permanent local usage. Now a court of the United States, in cases not arising under the national constitution or laws, is to administer the law of the state in which it sits. For such a court to declare, as a part of that law, a rule or principle which has not been enacted by the legislative authority of the state, and which has been repudiated and denied by its highest court, is simply to attempt to enact as law its own opinion or the opinions of those other federal courts or judges whom it follows. Again, it is a rule never denied that the federal courts are imperatively bound to follow the decisions of the highest court of the state in regard to the construction and application of the statutes of the state. But to obey this rule and yet to refuse a like authority to those decisions when the particular matter does not happen to have been made the subject of a statute in the given state, is to draw a distinction which is purely arbitrary and fanciful. Whether a rule—relating, for instance, to the negotiability of a particular kind of instrument—has been enacted by the legislature or settled by the solemn adjudications of the courts of the state, it is equally the "law" of the state, so far as the federal courts are concerned. Finally, the extreme desirability of a system of rules uniform throughout the country is conceded. But since the state courts will not surrender their individuality and agree to follow the lead of the federal courts in these matters, uniformity is not to be secured by the persisent application of the rule we are considering. It could be secured, or at least approximated, by the concurrent legislative enactment in the different states of laws covering the principal subjects of commercial and "general" law; and some progress in this direction has already been made, as by the adoption in several states of a uniform negotiable instruments law. But unless or until this ideal may be realized, it is at least possible to secure uniformity of decision on these subjects within each separate state. This must be done by the fed-

eral courts conforming their judgments, on such matters, to the rulings of the highest court of the state, which would involve no greater sacrifice of their dignity and independence than is implied in their accepting as conclusive the adjudications of that court upon the construction of the local statutes. The opposite course, the one now pursued, too often results not in harmony but in confusion. It is not an uncommon incident, but it does not redound to the credit of the law, that a citizen of a state, suing in one of its courts, is denied the identical relief which is granted, on the identical instrument, to a citizen of another state suing in a federal court which holds its session in the same city.

This subject is of such great practical importance that it seems appropriate to illustrate further the lines of thought which have been brought to bear upon it, by quotations from some of the most instructive opinions of the courts. And first, attention should be directed to the very able dissenting opinion of Mr. Justice Field in the case of Baltimore & O. R. Co. v. Baugh.[4] "If the law were expressed in a statute," said the learned justice, "no federal court would presume to question its efficacy and binding force. The law of a state on many subjects is found only in the decisions of its courts, and when ascertained and relating to a subject within the authority of the state to regulate, it is equally operative as if embodied in a statute, and must be regarded and followed by the federal courts in determining causes of action affected by it arising within the state. For those courts to disregard the law of the state as thus expressed, upon any theory that there is a general law of the country on the subject at variance with it, in cases where the causes of action have arisen within the state, and which, if tried in the state courts, would be governed by it, would be nothing less than an attempt to control the state in a matter in which the state is not amenable to federal authority by the opinions of individual federal judges at the time as to what the general law ought to be,—a jurisdiction which they never possessed, and which, in

[4] 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

my judgment, should never be conceded to them. That doctrine would inevitably lead to a subversion of the just authority of the state in many matters of public concern. It would also be in direct conflict with section 721 of the Revised Statutes [U. S. Comp. St. 1901, p. 581] which declares that 'the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' This provision is a reenactment of section 34 of the original judiciary act. 1 Stat. 92 [Act Sept. 24, 1789, c. 20]. Under the term 'laws,' as here mentioned, are included not merely those rules and regulations having the force of law which are expressed in the statutes of the states, but also those which are expressed in the judicial decisions of their tribunals. The latter are far more numerous, and touch much more widely the interests and rights of the citizens of a state in their varied relations to each other and to society in the acquisition, enjoyment, and transmission of property and the enforcement of rights and redress of wrongs. The term 'laws' in the constitution and statutes of the United States is not limited solely to legislative enactments, unless so declared or indicated by the context. When the fourteenth amendment ordains that no state shall deny to any person within its jurisdiction 'the equal protection of the laws,' it means equal protection not merely by the statutory enactments of the state, but equal protection by all the rules and regulations which, having the force of law, govern the intercourse of its citizens with each other and their relations to the public, and find expression in the usages and customs of its people and in the decisions of its tribunals. The guaranty of this great amendment as to 'the equal protection of the laws' would be shorn of half of its efficacy if it were limited in its application only to written laws of the several states and afforded no protection against an unequal administration of their unwritten laws. It has never been denied, that I am aware of, that the decisions of the regular judicial tribunals of a state, especially when

concurring for a succession of years, are, at least, evidence of what the law of the state is on the points adjudged. The law, being thus shown, is as obligatory on those points in another similar case arising in the state, as if expressed in the most formal statutory enactments. If this is not so, I may ask, in anticipation of what I may say hereafter, what becomes of the judicial independence of the states.

"The doctrine that the application of the so-called general and unwritten law of the country to control a state law, as expressed by its courts, in conflict with it, has the sanction of Congress by its supposed knowledge of the decisions of this court to that effect, and its subsequent silence respecting them does not strike me as having any persuasive force. The silence of Congress against judicial encroachments upon the authority of the states cannot be held to estop them from asserting the sovereign rights reserved to them by the tenth amendment of the constitution. Such silence can neither augment the powers of the general government nor impair those of the states. Silence by one or both will not change the constitution and convert the national government from one of delegated and limited powers, or dwarf the states into subservient dependencies. Acquiescence in or silence under unauthorized power can never give legality to its exercise under our form of government. * * * Is the federal judicial department to force upon these states views of the common law which their courts and people have repudiated? I cannot assent to the doctrine that there is an atmosphere of general law floating about all the states, not belonging to any of them, and of which the federal courts are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.

"The present case presents some singular facts. The verdict and judgment of the court below were in conformity with the law of Ohio, in which state the cause of action arose and the case was tried, and this court reverses the judgment because rendered in accordance with that law, and holds it to have been error that it was not rendered

according to some other law than that of Ohio, which it terms the general law of the country. The court thus assumes to disregard what the judicial authorities of that state declare to be its law, and to enforce upon the state some other conclusion as law which it has never accepted as such, but always repudiated. * * * Had the case remained in the state court, where the action was commenced, the plaintiff would have had the benefit of the law of Ohio. The defendant asked to have the action removed, and obtained the removal to a federal court because it is a corporation of Maryland, and thereby a citizen of that state by a fiction adopted by this court that members of a corporation are presumed to be citizens of the state where the corporation was created, a presumption which, in many cases, is contrary to the fact, but against which no averment or evidence is held admissible for the purpose of defeating the jurisdiction of a federal court. Thus in this case a foreign corporation not a citizen of the state of Ohio, where the cause of action arose, is considered a citizen of another state by a fiction, and then, by what the court terms the general law of the country, but which this court held in Wheaton v. Peters [8 Pet. 591, 8 L. Ed. 1055] has no existence in fact, is given an immunity from liability in cases not accorded to a citizen of that state under like circumstances. Many will doubt the wisdom of a system which permits such a vast difference in the administration of justice, for injuries like those in this case, between the courts of the state and the courts of the United States.

"I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have myself, in many instances, unhesitatingly

and confidently, but as I think now erroneously, repeated the same doctrine. But notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence. * * * To this autonomy and independence of the states, their legislation must be as free from coercion as if they were separated entirely from connection with the Union. There must also be a like freedom from coercion or supervision in the action of their judicial authorities. Upon all matters of cognizance by the states, over which power is not granted to the general government, the judiciary must be as free in its action as the courts of the United States are independent of the state courts in matters subject to federal cognizance. * * * Such being the nature of the judicial department, and the free exercise of its powers being essential to the independence of the state, how can it be said that its decisions as to the law of the state, upon a matter subject to its cognizance, can be ignored and set aside by the courts of the United States for the law or supposed law of another state or sovereignty, be it the general or special law of that state or sovereignty? If a federal court exercises its duties within one of the states where the law on the subject under consideration is uncertain and unsettled, 'where' as Chief Justice Marshall said, 'the state courts afford no light,' it must, as we have already stated, exercise an independent judgment thereon, and pronounce such judgment thereon as it deems just. But no foreign law, or law out of the state, whether general or special, or any concep-

tion of the court as to what the law ought to be, has any place for consideration where the law of the state in which the action is pending is settled and certain. A law of the state of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place, without a manifest usurpation by the federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will in the end 'die among its worshipers.'

"The independence of the states, legislative and judicial, on all matters within their cognizance is as essential to the existence and harmonious workings of our federal system as is the legislative and judicial supremacy of the federal government in all matters of national concern. Nothing can be more disturbing and irritating to the states than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented, and which has no existence except in the brain of the federal judges in their conceptions of what the law of the states should be on the subjects considered.

"The theory upon which inferior courts of the United States take jurisdiction within the several states is, when a right is not claimed under the constitution, laws, or treaties of the United States, that they are bound to enforce, as between the parties, the law of the state. It was never supposed that, upon matters arising within the states, any other law than that of the state would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the state would be enforced differently by the federal court sitting in the state and the state courts; that there could be one law when a suitor went into the state courts, and another law when the suitor went into the federal courts, in relation to a cause of action arising within the state,—a result which

must necessarily follow if the law of the state can be disregarded upon any view which the federal judge may take of what the law of the state ought to be, rather than what it is."

These weighty considerations, with some others bearing on the same subject, are further emphasized in an important opinion of the Supreme Court of Pennsylvania, delivered by Judge Mitchell, from which the following quotation is taken: "The so-called commercial law is a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same; and it is therefore common to say that such is the commercial law; but, except as a convenient phrase, such general law does not exist. There must be a state or government of which every law can be predicated, and to whose authority it owes its existence as law. Without such sanction it is not law at all; with such sanction it is law without reference to its origin or the concurrence of other states or people. Such sanction it is the prerogative of the courts of each state themselves to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law. It is universally conceded that, as to statutes, the decisions of the state courts are binding upon all other tribunals, yet such decisions have no higher sanction than those upon the common law, for what the latter determine, equally with the former, is the law of the particular state. * * * It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in Swift v. Tyson, 16 Pet. 1 [10 L. Ed. 865]. Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose. It is argued now that, as to such questions, the state courts have also similar liberty. It would be sufficient answer to this argument that such a

course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is, in principle and in practical effect, impairing the obligation of the contract, which even the sovereign power of a state is prohibited from doing. But we prefer to rest the matter upon the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and is thus very recently summed up by the most learned of living jurists: 'Questions growing out of contracts made and to be performed in a state are decided by the national court of last resort, not in accordance with the unwritten or customary law of the state where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law, which does not exist, and is not to be found in the books. The state courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligation of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying. * * * Whether a recovery shall be had on a promissory note which has been taken as collateral security for an antecedent debt against a maker from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania, and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and if that is federal, the plaintiff will prevail; if it is local, the defendant. Such a result tends to discredit the law. * * * Enough has been said to show that no uniform rule can be deduced from the decisions of the English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality. * * * Had the New York legislature declared that notes made and negotiated in that state should follow the rule laid down [in a certain decision of its supreme court] the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt

of the national legislature to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this regard than the legislature.' We conclude therefore that the distinction between the binding effect of decisions on commercial law and on statutes is utterly untenable; that the law declared by state courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted and certainly not to be followed." [5]

As to the practical results of the doctrine followed by the United States courts, and also as to the uncertainty and confusion caused by its lack of precision, the matter has been very well stated by a learned federal judge in the following terms: "The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding and final. This unfortunate condition of our jurisprudence results from our dual system of government. It has no existence in any other country, and ought to be confined within the narrowest limits possible in this. Nothing can be more repugnant to one's sense of justice, or to a uniform and harmonious administration of the law, than to require the citizen to be bound by conflicting decisions of courts of different governments. Under the operation of this unseemly rule, a suit against one in a state court may be decided one way, and a suit against the same party in a federal court, involving the very same question, may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case. It was the hope that this court would overrule the decision of the Supreme Court of Iowa in a similar case that caused the removal of this case into the

[5] Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672, citing Hare, Const. Law, 1107–1117.

circuit court. The class of questions as to which different rules of decision may obtain, and the federal courts may disregard the decisions of the state courts thereon, has not been very clearly defined. What is said here has reference, of course, to non-federal questions, such as the one raised in this case. As to federal questions, there is but one rule of decision and one court of last resort. The general statement has often been made that the federal courts are not bound to follow the decisions of the state courts on questions of general jurisprudence, when unaffected by state legislation; but no exact enumeration has ever been made, or ever can be made, of the questions that come within this general definition. Moreover, the decisions of the supreme court relating to the subject are not uniform or harmonious." [6]

But in support of the rule of the United States courts, much stress has been laid upon their judicial duty to bring their own judgment and legal knowledge to bear on the solution of litigated questions before them. Thus, it is said: "It is not only the privilege, but the duty, of the federal courts, imposed upon them by the constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon, questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them. And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents." [7] But to this it may be answered, in the first place, that there is

[6] Dissenting opinion of Caldwell, J., in Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

[7] Independent School Dist. of Sioux City, Iowa, v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364.

no obvious reason for singling out questions of so-called general jurisprudence or commercial law as peculiarly appropriate for the exercise of the independent judgment of the federal courts. If it is a part of their judicial duty to pay no attention to the decisions of the state courts (for that is what the argument amounts to) in one class of cases, it is equally so in all cases before them, and therefore in regard to the construction of state statutes, which is admittedly otherwise. Further, the argument is fallacious because it involves a confusion of thought as to what an "independent judgment" really is. This has been very tersely put by Mr. Circuit Judge Taft, in the following words: "Counsel for complainants contends that his clients are entitled to the independent judgment of this court upon the constitutionality of the law. They are; but that judgment must be based on the controlling authorities which come to the knowledge of the court before its final judgment is entered." [8] And if any further confutation of this theory were needed, it is found in an opinion of another federal court, where it is very pertinently remarked: "In extending the judicial power of the United States to controversies between citizens of different states, the only purpose indicated by the constitution was to provide another *forum* than that of the state, not another *law* than that of the state." [9]

Yet, as was stated at the outset of this discussion, the general rule has become so firmly imbedded in the federal jurisprudence that it is too late to hope that it will ever be abrogated or even materially modified. Some attempts in the latter direction have been made. Thus, it was said in one case that, even on questions of general commercial law, the federal courts ought to follow the decisions of the state courts when the latter were based on a long-established local custom having practically the force of a statute.[10] And this, indeed, derives some support from the

[8] Western Union Tel. Co. v. Poe (C. C.) 64 Fed. 9.

[9] McClain v. Provident Sav. Life Assur. Soc., 110 Fed. 80, 49 C. C. A. 31.

[10] In re Hopper-Morgan Co. (D. C.) 154 Fed. 249.

statement in the leading case that the exemption of the United States courts from the necessity of following state decisions was understood to apply to "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation." [11] Again, the federal courts have occasionally abandoned their position on this question and followed the rulings of the state courts, though the matter was one of commercial law, where a glaring injustice would otherwise result. This was done in a case where, by reason of the situation of the parties and of the subject-matter, if the lower federal court had followed the doctrine of the United States Supreme Court, rejecting that of the state court, one of the parties would have been subjected to a double payment of the same debt, without the possibility of obtaining any relief from the federal courts.[12] But on the other hand, the rule has sometimes been applied with such severity that even the explicit agreement of the parties to a commercial instrument could not make the local rules applicable to its interpretation. This was the ruling in a case where a note contained a provision that "this note and the coupons hereto attached are to be construed by the laws of the state of Kansas." But the federal court held that this only meant the statutes of the state with reference to negotiable instruments, and did not include the decisions of the local courts construing like contracts, which decisions, accordingly, it was under no obligation to regard.[13]

COMMERCIAL LAW

189. In determining questions arising out of the law of negotiable instruments, or in regard to other contracts and transactions of a commercial character, which are not governed by any local statute, the

[11] Swift v. Tyson, 16 Pet. 1, 18, 10 L. Ed. 865.

[12] Sonstiby v. Keeley (C. C.) 7 Fed. 447.

[13] Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221, 59 C. C. A. 225.

federal courts are not bound to follow the decisions of the courts of the state where the contract in question was made or is sought to be enforced.

This rule may be regarded as one of the most important branches or applications of the more general rule stated in the preceding section. It is supported by numerous and uniform decisions of the federal courts.[14] It is applied to all the ordinary features and incidents of the various kinds of negotiable instruments, except in so far as questions relating to them may have been already settled by statutory enactment in the particular state. To this extent, therefore, the courts of the United States have evolved a more or less complete and consistent jurisprudence, governing this department of the law, based on what is supposed to be the general mercantile law, or, which amounts to the same thing, comprising those rules and principles which have appeared to the federal courts to be most generally accepted and approved, most in harmony with the general current of authorities, and most consonant to reason and justice, but free from all local variations. In applying these rules and principles, they hold themselves entirely free from any constraining force of the rulings of the courts of the particular state. Those rulings are, indeed, treated with respectful consideration, but are not allowed to introduce exceptions or variations into the system of rules worked out by the United States courts. That is to say, the United

[14] Oates v. First Nat. Bank, 100 U. S. 239, 25 L. Ed. 580; Brooklyn City & N. R. Co. v. National Bank of Republic, 102 U. S. 14, 26 L. Ed. 61; H. Scherer & Co. v. Everest, 168 Fed. 822, 94 C. C. A. 346; Continental Securities Co. v. Interborough Rapid Transit Co. (C. C.) 165 Fed. 945; Donnell v. Columbian Ins. Co., 2 Sumn. 366, Fed. Cas. No. 3,987; Robinson v. Commonwealth Ins. Co., 3 Sumn. 220, Fed. Cas. No. 11,949; Williams v. Suffolk Ins. Co., 3 Sumn. 270, Fed. Cas. No. 17,738; Riley v. Anderson, 2 McLean, 589, Fed. Cas. No. 11,835; Meade v. Beale, Taney, 339, Fed. Cas. No. 9,371; Bradley v. Lill, 4 Biss. 473, Fed. Cas. No. 1,783; Schenck v. Marshall County, 1 Biss. 533, Fed. Cas. No. 12,449; Jewett v. Hone, 1 Woods, 530, Fed. Cas. No. 7,311; Gloucester Ins. Co. v. Younger, 2 Curt. 322, Fed. Cas. No. 5,487; Mutual Safety Ins. Co. v. Cargo of The George, Olcott, 89, Fed. Cas. No. 9,981.

States Supreme Court will consistently adhere to its own former determination of like questions, without regard to contrary judgments in the state in which the controversy arose; while the lower federal courts will consider themselves absolutely bound by a precedent set by the supreme federal court, and, in the absence of such a precedent, will rather follow the decisions of co-ordinate federal courts than those of the state courts; and if the precise question is res nova in the federal jurisprudence, any federal court will consult the whole body of case-law applicable to it, English and American, and be guided by the apparent preponderance of authority, but without paying any special or peculiar regard to the adjudications of the courts of the state in which it happens to sit. Thus, for example, the question of the negotiability of a given instrument,—including the question whether it is such an instrument as may be taken within the definition of that term given by the general mercantile law, and including the consideration of what elements are necessary to impart to it the character of negotiability and what additions to it may destroy its negotiable character,—is a question pertaining to the "general commercial law," with regard to which the federal courts are not bound by local decisions, unless predicated on a special statutory enactment.[15] Hence the question whether a stipulation in a note or bill of exchange to pay attorneys' fees in case of its collection by suit does or does not destroy its negotiable character, and whether such a stipulation may or should be enforced in the particular case, will be decided without reference to the local decisions.[16] So again, whether or not a certificate of deposit is a negotiable instrument, when not controlled by statute, is a question of general commercial law, upon which a federal court is not concluded by the rulings of the state court.[17] Again,

[15] State Nat. Bank v. Cudahy Packing Co. (C. C.) 126 Fed. 543; Austen v. Miller, 5 McLean, 153, Fed. Cas. No. 661; Windsor Sav. Bank v. McMahon (C. C.) 38 Fed. 283, 3 L. R. A. 192.

[16] Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595; The Avalon (D. C.) 169 Fed. 696.

[17] Forrest v. Safety Banking & Trust Co. (C. C.) 174 Fed. 345; Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania (C. C.) 105 Fed. 491.

it is the rule of the federal courts, according with what they have decided to be the general commercial law, that persons who place their names on the back of a promissory note before its delivery to the payee, and for the purpose of giving credit to the maker, are to be treated and held as joint makers of the note, and therefore cannot escape liability on the ground of want of notice and protest. In some of the states, by the decisions of their courts, persons in this situation are held as ordinary indorsers or as accommodation indorsers. But if the action is in a federal court, the federal rule will be applied, notwithstanding the prevalence of a contrary rule in the local state courts.[18] This is also true of the rule established by the uniform decisions of the United States courts that the contract created by the indorsement and delivery of a negotiable note cannot be contradicted, added to, or varied by proof of a contemporaneous parol agreement.[19] And generally, in regard to the validity of negotiable instruments in the hands of bona fide holders, taking before maturity and without notice of irregularities, and the rights of such parties and the defenses available to them, the courts of the United States follow their own course of decisions, without being in any way controlled by the judgments of the state courts.[20] So also, in an action in a federal court, the question of the rate of interest and damages on the non-payment of a bill of exchange is one of general jurisprudence and will not be determined by the local law.[21]

The rule, however, is not confined to the determination of questions relating to notes and bills, but extends to other instruments and transactions usually occurring in trade and commerce. Thus, it is said that a contract of guaranty is a well-known form of commercial contract, as to the con-

[18] Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; First Nat. Bank v. Lock-Stitch Fence Co. (C. C.) 24 Fed. 221.

[19] Northern Nat. Bank v. Hoopes (C. C.) 98 Fed. 935.

[20] Marshall County v. Schenck, 5 Wall. 772, 18 L. Ed. 556; Town of Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523; Citizens' Sav. Bank v. City of Newburyport, 169 Fed. 766, 95 C. C. A. 232.

[21] Ex parte Heidelback, 2 Low. 526, Fed. Cas. No. 6,322.

struction and effect of which the federal courts are not bound to follow state decisions, unless in cases where they are based on a local statute or on a local usage having the force of a statute.[22] So of the question whether a bill of lading, issued by a railroad company, whereby it agreed to carry freight beyond its own line to a place named for final delivery, was a through contract.[23] And so also, state court decisions are not controlling on a question as to the general power of brokers in dealing with the property of their principals.[24]

But all these rulings proceed on the assumption that the particular question is not governed by a local statute. It is in the undoubted power of any state to enact the whole body of commercial law, or any part of it, into a statute, and to introduce such special provisions, or such exceptions or departures from the generally accepted rules, as may seem good to its legislative authority, provided only that no constitutional restrictions are violated. And when this is done, the statute becomes a rule of decision which the United States courts absolutely must follow in deciding controversies originating in that state or to be governed by its laws. And more than that, the authoritative construction of the statute by the highest court of the state is equally controlling upon them.[25] And further, state statutes which enlarge the general or common commercial law will be enforced by the federal courts in appropriate cases; for they are not confined, in determining rights and awarding remedies, to the commercial law as it may exist outside of such statutes.[26] But it should not be forgotten that the federal courts have the right and power to determine all questions relating to their own jurisdiction without regard to state statutes or state decisions, for such questions cannot be in any way prejudged by either the legislative or judicial departments of a state government. And this principle some-

[22] Johnson v. Charles D. Norton Co., 159 Fed. 361, 86 C. C. A. 361.
[23] Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.
[24] Bragg v. Meyer, McAll. 408, Fed. Cas. No. 1,801.
[25] Davie v. Hatcher, 1 Woods, 456, Fed. Cas. No. 3,610.
[26] Bank of Sherman v. Apperson (C. C.) 4 Fed. 25.

times impinges on the rule now under consideration. Thus, an act of Congress provides that the federal courts shall not take jurisdiction of a suit founded on a contract in favor of an assignee unless the assignor could have prosecuted the suit in the same court, "except in cases of promissory notes, negotiable by the law merchant, and bills of exchange." And it is held that the negotiability of a note, so far as is necessary to determine the question of jurisdiction, is governed wholly by the rules of the law merchant, regardless of the statutory provisions of the state in which the action is brought.[27]

GENERAL OR COMMON LAW

190. Questions depending upon the common law, or upon general principles of jurisprudence, and not governed by constitutional or statutory provisions in the particular state, are determined by the federal courts upon a consideration of all the available authorities, without according any controlling authority to the decisions of the state wherein they sit or in which the cause of action arose.

In regard to all litigated questions of the kind variously described as "questions of general law," "questions depending on general principles of law," "questions belonging to the general domain of jurisprudence," or "questions arising under the common law," the rule is well established that the courts of the United States are under no obligation to follow the decisions of the courts of the state in which their sessions are held or in which the controversy originated.[28] The only exception to this rule which has been noted is

[27] Windsor Sav. Bank v. McMahon (C. C.) 38 Fed. 283, 3 L. R. A. 192.

[28] Pennsylvania R. Co. v. Hummel, 167 Fed. 89, 92 C. C. A. 541; Willis v. Board of Com'rs of Wyandotte County, 86 Fed. 872, 30 C. C. A. 445; Union Bank of Richmond v. Board of Com'rs of Oxford (C. C.) 90 Fed. 7; Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206; Mohr v. Manierre, 7 Biss. 419, Fed. Cas. No. 9,695.

in the case where a decision or a series of decisions of the highest court of a state, accepted and acted upon by the community, have established a "rule of property," and where this is the case, the adjudication of the state court should be followed by the federal court, even though the particular question is to be determined entirely by the application of common-law rules.[29] But it does not follow that no attention whatever is to be paid to determinations made by the highest court of the state in similar cases. The rule only means that the federal court, as one of coordinate jurisdiction with the state court in such cases, is not absolutely bound by the decisions of the state court, though they should be treated with respect and accorded all the weight and influence to which they may be intrinsically entitled.[30] And even more than this, in order to avoid conflicting decisions as far as possible, if the federal court is at all in doubt as to a question of general law, it is its duty to "lean towards" the decision of the state court.[31] And so it was very properly decided by a federal court in an action against a railroad company to recover damages for injuries sustained by a passenger, where it was shown that an exactly similar action between the same parties had been dismissed pursuant to the unanimous opinion of the highest court of the state, and the questions of negligence presented were not questions as to which the federal and state courts were at variance, that comity required it to follow the decision of the state court.[32]

It is by no means easy to define the exact scope of these expressions "general law," "general jurisprudence," and "common law." Nor has any precise delimitation been hith-

[29] Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298. See supra, Chapter V, for the general doctrine of "rules of property," and Chapter XIII, for its particular application in the federal courts with reference to the authority of state decisions.

[30] Branch v. Macon & B. R. Co., 2 Woods, 385, Fed. Cas. No. 1,808.

[31] Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817.

[32] Mearns v. Central R. R. of New Jersey, 139 Fed. 543, 71 C. C. A. 331.

erto attempted. But for practical purposes the federal courts draw a distinction between those questions which depend wholly upon the construction or application of a state statute or of a local usage having the force of law or of a local rule of property, and those questions which are not thus locally regulated by legislative enactment, not allowing to the decisions of the courts of the state, however uniform or repeated, the force of "local law," except in the instance of rules of property. And although the general subject may be covered by a statute of the state, yet the particular question, as not depending on the construction of the statute, may be one of "general law," and therefore open to the independent decision of the federal courts. Thus, the interpretation of the insolvency law of a state belongs to the state courts. But where the question is as to the right of a creditor holding collateral security to a dividend on the full amount of his claim, if the statute makes no special provision for this case, it is deemed a question of general law, and the federal court is not bound to follow the ruling of the state court.[33] So, "the question whether a judgment is void or simply erroneous, is one which depends for its determination upon the general principles of the common law, and upon a consideration of all the authorities, except in those cases where the decision turns upon the construction of local statutes, which either define and limit the jurisdiction of the court by which the judgment was rendered, or prescribe the manner in which jurisdiction over the parties or the subject-matter shall be acquired."[34] So again, the conclusion of a state court as to the time when a cause of action accrues in case of fraud or concealment, when not based on a construction of the state statute of limitations, but on the view which it takes of the rule of the common law, is not binding on the courts of the United States.[35] And where the constitution of the state imposes a liability on stockholders of corporations for the corporate debts, by declaring that each stockholder shall be liable

[33] Tod v. Kentucky Union Land Co. (C. C.) 57 Fed. 47.
[34] Ryan v. Staples, 76 Fed. 721, 23 C. C. A. 541.
[35] Murray v. Chicago & N. W. Ry. Co. (C. C.) 62 Fed. 24.

to the amount of the stock held or owned by him, the question whether such liability is wholly statutory or partially contractual and therefore transitory, is a matter of general not local law.[36] And so, a decision by a state court that every right of action given by a statute is in the nature of a specialty, is not, when applied to a particular statute of that state, a construction of that statute which a federal court is bound to follow, but is a ruling upon a question of general law.[37]

Without attempting to classify all the various instances in which the federal courts have held the particular question before them to be one of general law, rather than of local law, and have therefore held themselves free to determine it without being in any way controlled by the adjudications of the state courts, we may mention the following as instructive examples of the rule: The question of what constitutes a public navigable stream;[38] the question of the right of an owner of land on one side of a navigable river, which forms the boundary between two states, by artificial structures to turn the waters upon land on the opposite side of the river;[39] the question whether a case of double insurance has been made out, so as to require contribution between the insurers;[40] the question whether presumptions will be made in aid of a defective return of substituted service of process;[41] the question under what circumstances a collateral attack upon a judgment is permissible or proper;[42] the question of what will excuse a plaintiff for non-return of property replevied, on his failure in the action;[43] a question concerning the right of a party

[36] Converse v. Mears (C. C.) 162 Fed. 767.

[37] Brunswick Terminal Co. v. National Bank of Baltimore (C. C.) 88 Fed. 607.

[38] Chisolm v. Caines (C. C.) 67 Fed. 285.

[39] Cairo, V. & C. Ry. Co. v. Brevoort (C. C.) 62 Fed. 129, 25 L. R. A. 527.

[40] Meigs v. London Assur. Co., 134 Fed. 1021, 68 C. C. A. 249.

[41] King v. Davis (C. C.) 137 Fed. 198.

[42] Phœnix Bridge Co. v. Castleberry, 131 Fed. 175, 65 C. C. A. 481.

[43] Three States Lumber Co. v. Blanks, 133 Fed. 479, 66 C. C. A. 353, 69 L. R. A. 283.

to an executory contract, upon the refusal of the other party to perform, to sue for and recover his entire damages for the breach, without waiting for the expiration of the time for performance;[44] the admissibility of a parol agreement to limit the effect of a written contract;[45] the question when an agent, effecting insurance on his principal's property, is to be deemed an agent of the insurer and when of his principal only;[46] the question whether the exercise of the police power of a state justifies the taking or damaging of private property without compensation.[47] Again, a rule established by the supreme court of a state that the holders of municipal bonds must make affirmative proof of the assent of taxpayers of the municipality to the creation of the debt evidenced by the bonds, is not obligatory upon the federal courts, for the reason that it does not rest upon the construction of a state statute, but upon general principles of law.[48]

VALIDITY AND CONSTRUCTION OF CONTRACTS

191. Questions concerning the validity, construction, and effect of particular contracts, when they do not depend upon state statutes or rules of property established within the state, are questions of general law, as to which the federal courts exercise an independent judgment without being obliged to follow the decisions of the courts of the state.

Where the validity of a contract is to be tested, or the meaning of its provisions ascertained, or its effect on the rights of parties determined, according to general principles of law not local or peculiar to the state where the controversy arose, the federal courts do not consider themselves imperatively bound to follow the rulings of the courts

[44] H. T. Smith Co. v. Minetto-Meriden Co. (C. C.) 168 Fed. 777.
[45] Van Vleet v. Sledge (C. C.) 45 Fed. 743.
[46] Travelers' Ins. Co. v. Thorne, 180 Fed. 82, 103 C. C. A. 436.
[47] Hollingsworth v. Parish of Tensas (C. C.) 17 Fed. 109.
[48] Town of Venice v. Murdock, 92 U. S. 494, 23 L. Ed. 583.

of that state in similar cases, though they will give them attentive consideration and accord them due weight among the various authorities which may be consulted.[49] Thus, a decision of the highest court of a state upon the construction of a deed, as to matters and language belonging to the common law, and not to any local statute, although entitled to high respect, is not held conclusive upon the Supreme Court of the United States.[50] But if the contract in question is one relating to the sale or conveyance of real or personal property, and contains words or phrases which, in virtue of local decisions, have acquired a definite meaning, and have thus become rules of property within the state, then the interpretation of such provisions ceases to be a question of general law, quoad hoc, and becomes one of local law, so that the federal courts should follow the decisions of the state courts which have fixed their meaning.[51]

Whether a contract is valid, voidable, or void, as between the parties to it, is often a question depending upon the application of general principles of law, and not affected by any existing statute of the particular state. Where this is the case, the federal courts consider that they do not administer the domestic law of the state in which they sit or in which the cause originated, but that "general law" which is supposed to be everywhere applicable, and hence they base their judgments upon a survey of all the pertinent authorities, including, indeed, those of the particular state, if any there be, but not giving to them any predominating influence. Thus, where the validity of an assignment of a policy of life insurance between citizens of a given state and made in that state, is to be determined by a federal court sitting therein, and such validity does not depend

[49] Johnson v. Charles D. Norton Co., 159 Fed. 361, 86 C. C. A. 361; Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221, 59 C. C. A. 225; Gilbert v. American Surety Co., 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253; City of Ottumwa, Iowa, v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604; Bancroft v. Hambly, 94 Fed. 975, 36 C. C. A. 595.

[50] Foxcroft v. Mallett, 4 How. 353, 11 L. Ed. 1008.

[51] Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221, 59 C. C. A. 225.

on a local statute or usage, but is to be decided upon principles of general law, the court must exercise an independent judgment, although it may lead to a conclusion different from that reached by the local courts.[52] So again, the rule of the Supreme Court of the United States that a chattel mortgage which gives to the mortgagor the right to sell the property covered, and to replace the goods sold with others, which shall come under the operation of the mortgage, is fraudulent and void as to other creditors as a matter of general law, is to be followed by the lower federal courts in proceedings in bankruptcy, without regard to the decisions of the state court on the same question.[53] So, a decision of the highest court of a state, holding a contract made by a city to be void upon the facts shown, but not upon a construction of any local statute, is not conclusive upon a federal court.[54] And if it shall have been determined that the contract under consideration is void, then the further question of the effect of its invalidity upon the rights of the parties to the pending suit, is not one of local law (unless expressly governed by a statute), but one of general law, and open to the independent determination of the federal courts.[55]

The validity of a contract may depend directly on its being in conformity with, or in violation of, the provisions of a local statute. If this is to be determined upon a construction of the statute, the question is for the judgment of the state courts, whose rulings will be followed by the federal courts. But it is otherwise if the question is to be determined upon a construction of the contract, for this is not a matter of local law. Thus, when the construction of the statute has been definitely fixed by the state courts, and it becomes necessary for a federal court, accepting such con-

[52] Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61; Gordon v. Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

[53] In re Hull (D. C.) 115 Fed. 858.

[54] City of Mankato v. Barber Asphalt Pav. Co., 142 Fed. 329, 73 C. C. A. 439.

[55] Gilbert v. American Surety Co., 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253.

struction, to apply it as so construed to a particular contract, and to determine, upon a consideration of all the provisions of the contract, whether it is in violation of the statute, then the court is entitled to express an independent judgment, the question here involved being one of general law and not of statutory construction.[56] But on the other hand, if there is nothing peculiar in the contract itself, but the broad general question is whether any and all contracts of that class are within the prohibition of the statute, it is essentially a matter of local law. To cite a familiar illustration, we may take the case of a mortgage made within a given state and covering real property therein, and presenting no unusual features except that it was executed and delivered on Sunday. Whether or not it is rendered void by a statute of that state which prohibits labor or the transaction of business on Sunday is a question of statutory construction, not of the construction of the mortgage, and therefore it is governed by the decisions of the state courts, if any have been rendered on the point at issue, and they will be followed by the United States courts.[57] To pursue this distinction one step further, it does not follow that because a statute of the state requires the execution of a particular contract or other instrument, that all questions concerning it are questions of statutory law. Thus, the question of the construction and validity of a bond given in conformity to the requirements of a state statute is one of general law, as to which a federal court is not controlled by the decisions of the state courts.[58] And a United States court will not refuse to enforce a valid contract, not contrary to good morals or public policy, which is non-enforceable in the courts of the state merely on account of failure to comply with state administrative regulations.[59]

[56] Casserleigh v. Wood, 119 Fed. 308, 56 C. C. A. 212.

[57] See supra, p. 582.

[58] Kansas City Hydraulic Press Brick Co. v. National Surety Co. (C. C.) 149 Fed. 507.

[59] Eastern B. & L. Ass'n v. Bedford (C. C.) 88 Fed. 7.

LIABILITY FOR NEGLIGENCE OR OTHER TORTS

192. The question of liability for negligence and other torts, and of the measure of damages recoverable in actions therefor, when not modified or governed by statute law, is one of general jurisprudence, upon which the federal courts are not required to follow the decisions of the state courts, however pertinent.

In General

In so far as the legislature of a state may have enacted specific provisions regarding the liability of persons and corporations for their negligence and for torts committed by them, these matters become part of the local law; and the decisions of the state courts construing and applying such statutes are binding on the federal courts. But all questions of this kind which are not covered by statutes are considered questions of general law, and while the decisions of the highest court of the particular state will be regarded with respect, and treated as persuasive, they are not of controlling authority.[60] Thus, upon the question of the care required of a traveler on a highway, on approaching a street railway crossing, the federal court may well incline to an agreement of views with the supreme court of the state, though not concluded by its decision of a similar cause.[61] In line with this general principle was the decision of a federal circuit court in admiralty, in a collision case, where the question was presented as to the effect on the rights of the parties of a state statute prohibiting work and labor on Sunday under a penalty, one of the parties having violated the statute in moving his vessel on that day. It was held that this was not a question of the construction of the statute, but of the application of general rules of law to the case of a person who had disobeyed the statute, and consequently that the federal court must follow the decisions of the Supreme Court of the United States and not

[60] Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369; Force v. Standard Silk Co. (C. C.) 160 Fed. 992.

[61] Milford & U. St. Ry. Co. v. Cline, 150 Fed. 325, 80 C. C. A. 95.

those of the state tribunals.[62] It should be observed, however, that it may not be very easy to reconcile this decision with that of the federal supreme court in the case of Bucher v. Cheshire R. Co.,[63] in which it followed (contrary to its own opinion) a decision of the supreme court of a state that there could be no recovery of damages for injuries received by a plaintiff while traveling on a railroad on Sunday in violation of the state statute on that subject.

Negligence and Torts of Agents, Servants, and Lessees

The question whether a lessor railroad company is liable for the negligence of its lessee in the operation of trains on its road, in the absence of any state statute on the subject, is one of general law, as to which a federal court is not bound by the decisions of the highest court of the state, but by the rule established by the decisions of the United States courts.[64] This is also true of a question concerning the liability of a railroad company on a contract of transportation over a connecting line beyond its own terminus.[65] So of the question whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger. On this point the Supreme Court of the United States has said: "This question, like others affecting the liability of a railroad corporation as a common carrier of goods and passengers, such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment, is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the

[62] Sawyer v. Oakman, 1 Low. 134, Fed. Cas. No. 12,404, affirmed 7 Blatchf. 290, Fed. Cas. No. 12,402.

[63] 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

[64] Curtis v. Cleveland, C., C. & St. L. Ry. Co. (C. C.) 140 Fed. 777; Yeates v. Illinois Cent. R. Co. (C. C.) 137 Fed. 943.

[65] Michigan Cent. R. Co. v. Myrick, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.

several states." [66] But on the other hand, where petitioners in a federal court sought to recover damages for injuries against a receiver of a railroad appointed by that court, it was held that the laws of the state where the action arose would govern as to the defendant's liability.[67]

Imputed Negligence

The question whether or not the negligence of a parent should be imputed to a child of tender years, as in allowing it to stray into a place of danger where it receives injuries, has been held to be one of general rather than of local law, as to which a federal court should be guided by its own views of the law, and is not bound to follow the decisions of the state courts.[68]

Negligence of Municipal Corporations

The government of municipal corporations, on the other hand, and the extent of the liability to which they shall be made subject for the wrongdoing of those entrusted with the administration of their affairs, is essentially and peculiarly a matter of local law, in which the United States courts should undoubtedly acquiesce in the rules laid down by the highest court of the state. Hence, if the state court has held that a municipal corporation shall be liable (or not liable, as the case may be) for negligence in the management of its streets and highways or bridges by those officers charged with their maintenance and care, such adjudication will be accepted and followed by the federal courts within the state.[69]

Contributory Negligence

It is a settled and uniform rule of the federal courts that contributory negligence is an affirmative defense, that the burden of proof is on the defendant in this respect, and that it must be sustained by a preponderance of evidence. This

[66] Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

[67] Easton v. Houston & T. C. Ry. Co. (C. C.) 32 Fed. 893.

[68] Berry v. Lake Erie & W. R. Co. (C. C.) 70 Fed. 679.

[69] Edgerton v. Mayor, etc., of City of New York (D. C.) 27 Fed. 230; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260.

they consider a question of general law; and consequently their rule will be applied without regard to the fact that an opposite doctrine prevails in the courts of the state where the cause of action arose.[70]

Negligence of Telegraph Companies

The question of the liability of a telegraph company for a failure to make prompt delivery of a message entrusted to it is one of general law, as to which, in the absence of statutory provisions, the decisions of the state courts are not controlling on the federal courts.[71] In several of the states, as a piece of pure judicial legislation, and without the sanction or support of any statute, the courts have introduced the doctrine that a person to whom a telegraphic message is addressed, and who suffers grief, disappointment, or other injury to his feelings in consequence of the failure of the company to deliver it, or in consequence of delay in its transmission, may recover damages in an action against the company on the sole ground of such mental sufferings, and without showing any other ground of recovery or element of damages. But the federal courts have always refused to accept this doctrine, holding that the question was one of general law and that they were free to disregard entirely any state decisions which were contrary to their own opinion of the law.[72] In a few of the states, however, the statutes do appear to sanction this doctrine, and if they are so construed by the highest court of the state, its judgment must be accepted by the federal courts. But it is sometimes a difficult matter to determine whether a ruling of the state court was really based on a construction of the statute or on its own views of the common law. Such a case arose in the federal courts in Tennessee. A statute of that state requires the delivery of all telegraphic messages without unreasonable delay, imposes penalties on officers and agents of telegraph companies willfully violating its

[70] Chicago G. W. Ry. Co. v. Price, 97 Fed. 423, 38 C. C. A. 239; Hemingway v. Illinois Cent. R. Co., 114 Fed. 843, 52 C. C. A. 477.

[71] Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

[72] Western Union Tel. Co. v. Burris, 179 Fed. 92, 102 C. C. A. 386.

provisions, and further declares that the telegraph company shall be liable in damages to the party aggrieved. The highest court of the state had construed this statute as entitling the plaintiff to recover nominal damages in any event. If it had further interpreted the statute as conferring also the right to recover for mental damages or injured feelings, irrespective of any physical or financial injury, the federal court would have felt obliged to follow its interpretation. But the opinion of the state court did not appear to the federal court to involve this construction. It was understood as holding only that the common law would give the right to recover for injured feelings whenever the plaintiff had either a common-law or statutory right to recover "some damages" upon any other ground. As to the effect of the common law in this particular, the federal court felt itself perfectly free to differ from the state court. Hence the open question in the federal court was whether a statutory right to recover nominal damages for the breach of a statutory duty would afford a basis to recover also for injured feelings. And on this point, as a question of general jurisprudence, it took a position contrary to that assumed by the state court.[73]

Measure of Damages

The question of the measure of damages recoverable in an action of tort, when it is not governed by the constitution or statutes of the state, is a question of general jurisprudence, upon which the decisions of the state courts are not of controlling authority in the federal courts.[74]

Exemption from Liability

Common carriers, as well as other persons and corporations whose business is affected with a public interest, sometimes insert in their contracts (as, for instance, in a bill of lading) a stipulation exempting them from liability for loss or damage though caused by their own negligence or that of their servants or agents. The validity of such a stipulation is a question of general law, as to which the

[73] Western Union Tel. Co. v. Sklar, 126 Fed. 295, 61 C. C. A. 281.
[74] Woldson v. Larson, 164 Fed. 548, 90 C. C. A. 422.

federal courts are not bound to follow the decisions of the courts of the state in which the contract was made or the cause of action arose, but must decide on general principles. This is fully settled by the rulings of the Supreme Court of the United States.[75] Of one of its former decisions on this point, that court has said: "Notwithstanding there were decisions of the courts of New York thereon, the state in which the cause of action arose, this court held that it was not bound by them, and that in a case involving a matter of such importance to the whole country, it was its duty to proceed in the exercise of an independent judgment."[76] The duty of the inferior courts of the United States, in respect to this matter, is clearly stated in an opinion handed down by one of the circuit courts, from which we quote as follows: "The contract of shipment was made and shipment wholly performed within the state of Missouri, and counsel for the receiver have cited certain cases decided by the supreme courts of Missouri and Illinois, which are claimed to be decisive of the receiver's position herein. However highly we may regard the decisions of those courts, and the learning manifested in their decisions, it is unnecessary to examine these cases; for the Supreme Court of the United States, by an unbroken line of decisions extending through many years, and in cases wherein was involved the liability of a common carrier, has established the rule that the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from liability for his own negligence, is not a local question, upon which the decision of a state court must control; but that such question is a matter of general law, upon which the courts of the United States will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law, of which the courts of the state have concurrent jurisdiction, and upon a

[75] Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

[76] New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.

contract made and to be performed within the state." [77] On the same principle, the question as to the validity of contracts exempting telegraph companies from liability for mistakes, delay, or failure of delivery in the transmission of messages, unless they are repeated, is one of general law, as to which the federal courts are not controlled by the rulings of the local state courts.[78] It is possible to conceive of cases in which the judgments of the state court might have established a "rule of property" even in matters of this kind, which would be obligatory on the national courts. But a provision in a lease, to the effect that the lessor shall not be liable for the destruction of buildings on the leased land, though caused by his own negligence, does not affect the title to real estate in such wise as to constitute a rule of property, and thereby oblige the federal courts to conform their decisions to those of the state courts.[79] And it has been held that the extent of the liability of railroad companies for damages by fires is within the control of the states, and a federal court will hold an exemption in a lease by a railroad from such damages valid, if it does not appear to be contrary to the public policy of the state.[80]

LAW OF MASTER AND SERVANT

193. Where the relation of master and servant is unaffected by local statutes, the question of their mutual rights and duties, and of the responsibility of the master for injuries caused by or to his servants, is one of general law, as to which the courts of the United States are not bound to follow the decisions of the state courts.

194. Unless the matter has been locally regulated by statute, the question of the responsibility of a master

[77] Eells v. St. Louis, K. & N. W. Ry. Co. (C. C.) 52 Fed. 903.

[78] Western Union Tel. Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680.

[79] Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co. (C. C.) 62 Fed. 904.

[80] Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co. (C. C.) 62 Fed. 904.

for injuries to his servant caused by the fault or negligence of a fellow servant, and the further question as to who are fellow servants, within the meaning of the common-law rule on this subject, will be determined by the federal courts in accordance with general principles of law, and without special regard to the decisions of the local state courts.

Of late years many states have enacted laws regulating the mutual relations of employers and their servants, making provision for the greater safety and comfort of the laboring classes, relaxing the severity of common-law rules which bore heavily upon them, in some instances abolishing the "fellow servant" rule, and in others modifying or abrogating the defense of contributory negligence. The construction and interpretation of such statutes belongs to the courts of the state, and their decisions thereon are of controlling force in the federal courts. Thus, for example, where a local statute requires the owners of mills and factories to safeguard their machinery, not only is the law itself a rule of decision in the United States courts, but its construction and effect are matters of local law, so that the judgments of the highest court of the state thereon are binding precedents in the federal courts.[81]

But where such statutes have not been enacted, or in so far as they fail to cover the entire field of the mutual relations of master and servant, the federal courts hold themselves free to decide all questions of this character in accordance with general principles of law and the general current of authorities, without being obliged to conform to the decisions of the state courts.[82] Thus, the question of the responsibility of a railroad company (or any other employer) to its employés for injuries sustained in the course of their employment, may be fixed and determined by the

[81] Welsh v. Barber Asphalt Pav. Co., 167 Fed. 465, 93 C. C. A. 101.

[82] McPeck v. Central Vermont R. Co., 79 Fed. 590, 25 C. C. A. 110; Chandler v. St. Louis & S. F. R. Co., 127 Mo. App. 34, 106 S. W. 553.

statutory law of the state; but if it is not, it is treated by the United States courts as a question of general law, to be determined upon a consideration of all the authorities and of the principles underlying the general law of master and servant.[83] For instance, whether the doctrine "res ipsa loquitur" applies to an action for injuries to a servant by the breaking of a ladder rung on the side of a freight car is a question of general jurisprudence and not of local law.[84] It is the same with regard to injuries resulting from the act or neglect of servants or employés. Under what circumstances a master may be held responsible in damages for injuries suffered by third persons and caused by the negligent or tortious conduct of his employés, and, if responsible, whether exemplary damages may be recovered against him,—these are not in any sense local questions, unless taken within the field of statutory law, and the federal courts will exercise their own judgment in their solution, uncontrolled by the decisions of the state courts.[85]

This general rule, as well as some of the reasons on which it rests, was very explicitly stated by the Supreme Court of the United States in a leading decision, from which the following quotation is taken: "Passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property; but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this

[83] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; Salmons v. Norfolk & W. Ry. Co. (C. C.) 162 Fed. 722; Farrar v. St. Louis & S. F. R. Co., 149 Mo. App. 188, 130 S. W. 373; Illinois Cent. R. Co. v. Hart, 176 Fed. 245, 100 C. C. A. 49; Hough v. Texas & P. Ry. Co., 100 U. S. 213, 25 L. Ed. 612; New York, N. H. & H. R. Co. v. O'Leary, 93 Fed. 737, 35 C. C. A. 562.

[84] Patton v. Illinois Cent. R. Co. (C. C.) 179 Fed. 530.

[85] Norfolk & P. Traction Co. v. Miller, 174 Fed. 607, 98 C. C. A. 453.

respect as in others; but in the absence of such legislation, the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our constitution. Today, the volume of interstate commerce far exceeds the anticipation of those who framed this constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the interstate commerce act and its amendments, but also by an act passed at the last session requiring the use of automatic couplers on freight cars. The lines of this very plaintiff in error [a railway company] extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations, and duties subsisting between it and its employés change at every state line? If to a train running from Baltimore to Chicago it should, within the limits of the state of Ohio, attach a car for a distance only within that state, ought the law controlling the relation of a brakeman on that car to the company to be different from that subsisting between the brakemen on the through cars and the company? Whatever may be accomplished by statute,—and of that we have now nothing to say,—it is obvious that the relations between the company and employé are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law. The question is not local but general." [86]

Fellow Servant Rule

The federal courts hold themselves free to decide, without any constraining influence from the decisions of the courts of the particular state, and in accordance with gen-

[86] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. The precise question in this case was whether the engineer and the fireman on a railroad locomotive are fellow servants.

eral principles of law, the circumstances under which the common-law rule may be applied exempting a master from liability for injuries suffered by a servant in the course of his employment when the same were caused by the fault or negligence of a fellow servant, and also the further question as to who are to be considered fellow servants within the meaning of this rule, or, in other words, whether or not the two employés immediately concerned in the particular accident occupied that relation towards each other.[87] These questions, if they are not locally determined by statute, are considered as questions of general law, and it is immaterial that the judgment of a federal court on such a question may be directly opposite to that reached by the highest court of the state in which it sits, if it accords with what is shown by the general current of authorities to be settled as the general law of the subject. The same principle applies to the modern modification of the common-law doctrine in the case of "vice principals" or superior servants.[88] And it should be noted that if the precise point at issue has not been adjudicated by the Supreme Court of the United States, it is the duty of a federal circuit or district court to follow a decision of the circuit court of appeals, rather than a contrary decision of the supreme court of the state.[89]

[87] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933, 82 C. C. A. 81; Snipes v. Southern Ry. Co., 166 Fed. 1, 91 C. C. A. 593; Jones v. Southern Pac. Co., 144 Fed. 973, 75 C. C. A. 602; Salmons v. Norfolk & W. Ry. Co. (C. C.) 162 Fed. 722; Pennsylvania Co. v. Fishack, 123 Fed. 465, 59 C. C. A. 269; McPeck v. Central Vermont R. Co., 79 Fed. 590, 25 C. C. A. 110; Chandler v. St. Louis & S. F. R. Co., 127 Mo. App. 34, 106 S. W. 553; Hunt v. Hurd, 98 Fed. 683, 39 C. C. A. 226; Northern Pac. R. Co. v. Peterson, 51 Fed. 182, 2 C. C. A. 157; Newport News & M. V. Co. v. Howe, 52 Fed. 362, 3 C. C. A. 121; Dillon v. Union Pac. R. Co., 3 Dill. 319, Fed. Cas. No. 3,916; Spring Valley Coal Co. v. Patting, 112 Ill. App. 4. There are a few decisions of federal courts to the contrary, but they are opposed to the overwhelming weight of authority. See Atlantic Coast Line R. Co. v. Farmer, 176 Fed. 692, 100 C. C. A. 244; Kerlin v. Chicago, P. & St. L. R. Co. (C. C.) 50 Fed. 185; Becker v. Baltimore & O. R. Co. (C. C.) 57 Fed. 188.

[88] Elliott v. Felton, 119 Fed. 270, 56 C. C. A. 74.

[89] Wright v. Southern Ry. Co. (C. C.) 90 Fed. 260.

PUBLIC POLICY

195. On the question whether a given contract or transaction is contrary to general public policy, as distinguished from the local public policy of a particular state, the federal courts will decide on general principles, independently of the rulings of the state courts.

In the discussion of this subject in a previous chapter, it was pointed out that the general question of public policy may be involved in matters which are of general public concern or matters which concern a narrower and territorially restricted public; and that, in this sense, there is a national or general public policy, which may be distinguished from the public policy of any given state, the former being applicable to matters which concern the people at large, including matters entrusted to the control of the national government, and co-extensive with the Union, and the latter being adapted to the circumstances of the territory embraced within the boundaries of the state and applicable to all matters within state control.[90] As there stated, the rule is well settled that the question whether a given contract or transaction is contrary to the public policy of the state is a question of local law, as to which the federal courts will follow the decisions of the state courts. But we have now to consider the subject as a branch of the general rule that the United States courts are entirely independent of the judgments of the state courts in the determination of questions of "general law" or "general jurisprudence." And in this aspect, the principle applied by the national courts may be stated as follows: Where the question is as to the validity of a contract or transaction, considered with reference to the requirements of general public policy, as distinguished from the specific or local public policy of a state, it is a question of general law, and the decisions of the state courts are not of controlling au-

[90] Supra, Chapter XIII, p. 499.

thority.[91] It must be admitted that the distinction is not very sharp or clear. But the tendency of the federal courts is to bring within the class of contracts and dealings which are to be tested by a supposed "general" public policy all such as are of a commercial or mercantile character, and also such as are of common and general use throughout the entire country, not presenting any distinctively local or peculiar features. Thus, for example, whether a provision in a policy of insurance that no action shall be brought after the lapse of a year from the date of the death of the insured is valid is held to be a question of general public policy, as to which the federal courts will follow federal decisions, though in conflict with decisions of the highest court of the state.[92] So the question whether a provision in a lease by a railroad company of part of its right of way, exempting it from liability for damage to property situated on the leased land, resulting from the negligence of its employés or from fire communicated from its locomotives, is against public policy, is a question of general law, as to which the state decisions are not binding on the federal courts.[93]

INTERNATIONAL LAW

196. Questions of international law and international comity, as well as those arising under treaties with foreign powers and compacts between states, are decided by the federal courts in the exercise of their independent judgment and without being controlled by the decisions of the state courts.

This rule may be illustrated by a case where a federal circuit court of appeals refused to be bound by a decision of the highest court of a state, to the effect that a law of a foreign country was opposed to the policy of the state and

[91] Sheppey v. Stevens (C. C.) 177 Fed. 484; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Parker v. Moore, 115 Fed. 799, 53 C. C. A. 369.

[92] Spinks v. Mutual Reserve Fund Life Ass'n (C. C.) 137 Fed. 169.

[93] Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

could not be enforced within the state, the ground of its refusal being that questions of international comity do not depend on local law but are controlled by international law and custom. The action was by an employé of a Mexican railway company to recover damages for an injury caused by the negligence of the company, under a law of Mexico authorizing recoveries in such cases. The statute of Mexico allows the judge trying the case to award an "extraordinary indemnity," to an amount in his discretion, considering the "social position" of the person injured; and it was urged that to discriminate for or against a person by reason of such an adventitious circumstance was contrary to the policy of our laws. But no extraordinary damages were prayed for in this case, and the federal court considered this fact a sufficient answer to the objection, and sustained the action, though the courts of Texas (within which state the federal court was sitting) had dismissed actions brought in similar cases under this law of Mexico, for this and other reasons.[94] Again, in a group of cases in the Supreme Court of the United States, which arose in Louisiana, consideration was given to a defense against the plea of the statute of limitations. The theory set up was that there must be an implied exception to the provisions of the statute, by reason of the effect of the Civil War upon the administration of justice, since, during its continuance, the courts of the insurrectionary states, though open to the local public, were closed to citizens of the rest of the Union. The courts of Louisiana declined to recognize such an exception to the statute or give it effect. But the Supreme Court of the United States took and enforced a contrary view, holding itself entirely free to determine the question without reference to the rulings of the local courts, because the question was not upon the construction of the statute, but was a question of public or international law, as to which it was not obliged to accept the opinions of the state courts.[95] Again,

[94] Evey v. Mexican Cent. Ry. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

[95] Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939; The Protector, 9 Wall. 687, 19 L. Ed. 812; Levy v. Stewart, 11 Wall. 244, 20 L.

although decisions of the state courts concerning titles to land within the state are usually considered as establishing rules of property, obligatory on the federal courts, yet if such titles depend on compacts between states, the rule of decision is one of an international character, and is not to be drawn from the decisions of the courts of either of the states.[96]

CONFLICT OF LAWS

197. The federal courts are not controlled by the decisions of the state courts on questions of private international law, or the conflict of laws, unless in cases where they are based on a local statute or constitute a local rule of property.

Although there is some dissent from this proposition,[97] it is on the whole well established, as will appear from the cases herein cited in illustration of the rule. Thus, the question what law governs a contract between a building and loan association and a borrowing member, where the member resides in another state and the mortgaged property is there situated, and whether such contract is usurious, when that depends upon whether it is solvable under the laws of that state or of the state in which the association is domiciled, is a question of general commercial law, or, more properly, of private international law, upon which a federal court is not bound to follow the decisions of the courts of the state, but is governed by those of the superior federal courts.[98] So the question whether a promissory note is governed, as to usury, by the law of the state where it was executed and in which suit is brought, or of the state in which it was made payable, in the absence of a state statute

Ed. 86. And see Huntington v. Attrill, 146 U. S. 657, 683, 13 Sup. Ct. 224, 36 L. Ed. 1123.

[96] Marlatt v. Silk, 11 Pet. 1, 9 L. Ed. 609.

[97] See Parker v. Moore, 115 Fed. 799, 53 C. C. A. 369.

[98] Manship v. New South Building & Loan Ass'n (C. C.) 110 Fed. 845; United States Savings & Loan Co. v. Harris (C. C.) 113 Fed. 27.

on the subject, is one of general law.[99] Again, the penal character of a state statute, precluding its enforcement outside the state, is a question of general jurisprudence, which is not controlled by the decisions of the courts of the state.[100]

[99] Dygert v. Vermont Loan & Trust Co., 94 Fed. 913, 37 C. C. A. 389.

[100] Leyner Engineering Works v. Kempner (C. C.) 163 Fed. 605.

CHAPTER XVII

SAME; EQUITY AND ADMIRALTY

198. Equity Jurisprudence in General.
199–200. Equity Jurisdiction under State Statutes.
201. Admiralty and Maritime Law.

EQUITY JURISPRUDENCE IN GENERAL

198. In the exercise of their jurisdiction in equity, and in determining questions which depend upon the general principles of equity jurisprudence, the federal courts are not bound to follow the decisions of the courts of the state wherein they sit or where the controversy arose.

The act of Congress which directs that the laws of the several states shall be regarded as rules of decision in the courts of the United States, in cases where they apply, is limited by its express terms to "trials at common law," [1] and it is thoroughly well understood that this was meant to exclude, and does exclude, cases of equitable cognizance, so that, in cases of this class, the statute does not place the federal courts under any obligation to be guided or governed by the decisions of the local state courts.[2] In fact, the courts of the United States have a complete and uniform system of chancery law and practice of their own, which is administered without reference to the system prevailing in the particular state. As to the substantive part of this federal equity system,—which determines the jurisdiction in equity, the availability of equitable remedies, and the rules, principles, and maxims to be observed in administering equitable relief and adjusting it to the rights of the parties,—it is founded upon the jurisprudence of the high court of chancery in England as it existed in 1789 (the date of the original Judiciary Act), and enlarged by various

[1] Rev. St. U. S. § 721 (U. S. Comp. St. 1901, p. 581).
[2] Neves v. Scott, 13 How. 268, 14 L. Ed. 140.

subsequent acts of Congress, and to a limited extent by state statutes enlarging the jurisdiction in equity or providing new equitable remedies, and, on the other hand, modified and restricted by the constitutional and statutory provisions which are applicable to the jurisdiction of the federal courts in general, such as those relating to the diverse citizenship of parties and those fixing the minimum amount in controversy which shall be essential to their jurisdiction. As to the adjective part of the federal equity system,—that relating to practice and procedure,—it is based essentially on the practice in chancery prevailing in England at the time mentioned, but modified by the rules in equity made by the Supreme Court of the United States. In both aspects, therefore, it is regarded as a system of law and procedure which is general or national in character, not in any way dependent on the legislative or judicial action of the several states, and not subject to local modification or change.[3] Hence the rule, long established and universally recognized, that the courts of the United States are not bound to give any controlling weight or authority to the decisions of the courts of the state wherein they may sit, when they are proceeding in the exercise of their chancery jurisdiction and deciding questions which depend upon the general principles of equity jurisprudence.[4] In effect, in determining questions of this kind, both the state and federal courts refer to the same sources of information and are

[3] See, generally, Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; In re Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; McConihay v. Wright, 121 U. S. 205, 7 Sup. Ct. 940, 30 L. Ed. 932; State of Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518, 14 L. Ed. 249; Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132; United States v. Miller (C. C.) 164 Fed. 444; Vitzthum v. Large (D. C.) 162 Fed. 685; Hale v. Tyler (C. C.) 115 Fed. 833; Schoolfield v. Rhodes, 82 Fed. 153, 27 C. C. A. 95; Alger v. Anderson (C. C.) 92 Fed. 696.

[4] Russell v. Southard, 12 How. 139, 13 L. Ed. 927; Neves v. Scott, 13 How. 268, 14 L. Ed. 140; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847; Butler v. Douglass (C. C.) 3 Fed. 612; Burt v. Keyes, 1 Flip. 61, Fed. Cas. No. 2,212.

not dependent on each other for precedents.[5] Those sources of information, in the federal courts, are, first, the English chancery decisions, especially those rendered prior to 1789, and which settled what may be called the "common-law" or original principles of equity, worked out by the chancellors themselves, without either the aid or the interference of acts of Parliament,[6] but of course not neglecting later decisions, in so far as they are based on original or fundamental doctrines of equity, or on statutes which have been paralleled by legislation in this country. Second, the federal courts will refer to and place great reliance upon the equity decisions of the supreme federal court and of other federal courts having co-ordinate jurisdiction with them or appellate jurisdiction over them. Third, they habitually refer to the statements and arguments of approved text-writers on this subject. Fourth, they may and do consult the decisions of the courts of the various states, and particularly those in which a pure and separate system of equity is yet maintained. But the point to be here emphasized is that the decisions of the particular state where the federal court is located are not received by the latter court as controlling authorities or as having any greater persuasive force than the decisions of any other state, and that no influence is

[5] Butler v. Douglass (C. C.) 3 Fed. 612.

[6] See Alger v. Anderson (C. C.) 92 Fed. 696, 701, where it was remarked by Mr. District Judge Clark: "The rule being that this equity power must be construed according to equity jurisdiction in England as exercised at the time of the adoption of the constitution and of the Judiciary Act, any jurisdiction exercised by that court in its earlier history, but subsequently abandoned, and any enlargement of its jurisdiction by statute subsequent to 1789, are to be excluded. What may be called the common-law or original equity jurisdiction at that date has been changed and influenced so much subsequently by statute in England, at different periods, that the common-law and statutory jurisdiction must be understood and at all times distinguished, in order to avoid confusion and apparent conflict in the English decisions themselves, by reason of a failure, in the cases and in the books, to notice or make clear the two sources of jurisdiction. In the absence of close attention to the influence of English statutes, the decisions of the English chancery courts, particularly since 1858, would become misleading."

accorded to the decisions of any state court except in so far as they may appear to be in harmony with the general current of authorities. Exceptionally, however, there may be cases in which it is proper for the federal court to pay special deference to the rulings of the local state court, though not controlled by them. Thus, for instance, it is well established that equity follows the analogy of the statute of limitations; and hence, in deciding questions of limitation and laches, a federal court, though sitting in equity, may well follow the rule of decision in the state courts.[7]

We proceed to illustrate the main rule by a few examples of its application. A doctrine settled by the supreme court of a state, that the assignee of a bond and mortgage takes them subject to all existing legal and equitable defenses, will not be followed by a federal court in a proceeding in equity, since it is not bound in this case to accept the decision of the local court and since the contrary rule is settled by the general principles of equity.[8] So the question whether a creditor of a bankrupt is entitled to a preference on the ground that the claim is based on the bankrupt's misappropriation of a trust fund, does not depend on the construction of the contract between the parties, but on a rule of preference in equity, as to which the federal decisions, and not those of the state where the contract was made, must control.[9] Again, the right to fasten a special trust upon funds held by the receiver of an insolvent bank in a given state, not having been created by any statute of that state, but depending upon the general principles of law and equity applicable to the circumstances, the decisions of the supreme court of the state in relation thereto, if not in accord with the rulings of the United States Supreme Court or the decided weight of authority, do not constitute a rule of property binding on the federal courts.[10]

[7] Higgins Oil & Fuel Co. v. Snow, 113 Fed. 433, 51 C. C. A. 267.
[8] McFarlane v. Griffith, 4 Wash. C. C. 585, Fed. Cas. No. 8,790.
[9] John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422.
[10] Beard v. Independent Dist. of Pella City, 88 Fed. 375, 31 C. C. A. 562.

EQUITY JURISDICTION UNDER STATE STATUTES

199. Where the jurisdiction of a federal court sitting in equity is not derived from its general powers as a court of chancery, but is based on a statute of the state, the construction of that statute, as fixed by the highest court of the state, becomes a part of it, and must be adopted by the federal court.

200. But the United States courts always preserve the distinction between legal and equitable causes of action and proceedings; and neither state laws nor state decisions which authorize the local courts of equity to take cognizance of actions properly triable at law furnish a rule of decision for the federal courts.

Although it is not in the power of the states either to enlarge or to abridge the jurisdiction of the federal courts, in so far as that is fixed by the constitution and laws of the Union, yet the state legislatures may create new rights, of a nature to be cognizable in equity, or give new equitable remedies. And since the federal courts sitting in a given state are to administer the law of that state, in cases not depending on the national constitution or acts of Congress, they may administer and apply such equitable rights and remedies, provided the other facts essential to their jurisdiction are present in the particular case.[11] Now it is settled that, in cases depending upon a state statute, and involving no federal question, the United States courts will accept and be bound by the construction put upon the statute by the highest court of the state. And this applies to the case under consideration. Thus, where the proceed-

[11] See Carrau v. O'Calligan, 125 Fed. 657, 60 C. C. A. 347; People's Sav. Bank v. Layman (C. C.) 134 Fed. 635; Anthony v. Burrow (C. C.) 129 Fed. 783; Jaffrey v. Brown (C. C.) 29 Fed. 476; Bernheim v. Birnbaum (C. C.) 30 Fed. 885; Meade v. Beale, Taney, 339, Fed. Cas. No. 9,371. Compare Lamson v. Mix, Fed. Cas. No. 8,034.

ing is under a statute which gives to the chancery courts of the state jurisdiction to try questions of title raised in a suit for partition, the federal courts in the state may exercise the same jurisdiction, but in so doing they will be bound to follow the rulings of the state courts in respect to the interpretation of the statute. In the case in which this point was ruled, it was said: "It is urged upon the part of the complainant that in equitable remedies this court cannot be controlled by state legislation or by the decisions of its courts, but will only exercise the jurisdiction and afford the remedies exercised by the court of chancery in England, modified by the acts of Congress and by the rules of the Supreme Court of the United States. This is true so far as it relates to the general equity jurisdiction, but it is otherwise when the jurisdiction and remedy are derived from a statute of the state, as in this case." [12] Again, the rule that in cases depending upon the statutes of a state, and especially in those relating to the title to land, federal courts will adopt the latest settled construction of the state courts prevails in suits in equity as well as at law.[13] These principles may be illustrated by a group of cases relating to the jurisdiction of equity to entertain bills for the removal of clouds on title to land. In these suits, when free from the controlling influence of state statutes, the federal courts follow the general equity rule that possession on the part of the complainant is essential to the maintenance of his bill, and that if he is not in possession he will be remitted to his proper remedy at law, which is an action of ejectment. But in several states, the statutes now authorize the local courts to entertain a bill of this character without reference to the question of possession; and a federal court of equity, sitting in such a state, may give suitors the benefit of this enlargement of their rights in equity, provided the other facts necessary to its jurisdiction are present.[14] Thus, for in-

[12] Beebe v. Louisville, N. O. & T. R. Co. (C. C.) 39 Fed. 481.

[13] Loring v. Marsh, 2 Cliff. 311, Fed. Cas. No. 8,514.

[14] American Ass'n v. Williams, 166 Fed. 17, 93 C. C. A. 1. But compare United States Min. Co. v. Lawson (C. C.) 115 Fed. 1005.

stance, the Supreme Court of West Virginia has decided that a bill to remove a cloud on title created by a void or irregular tax deed can be maintained by one out of possession who relies solely on his legal title. This rule it has announced and adhered to as necessarily growing out of the tax laws of the state; and accordingly, the federal courts in that state, regarding this as an enlargement of equitable rights, have held themselves bound to adopt the same construction of the statutes and entitled to administer the same relief.[15] But it is only by the force of a statute that the general rule of equity in this matter can be locally varied in the federal courts. Although the local practice allows the maintenance of such a bill by one out of possession, yet if it is established only by the decisions of the state courts, not based on a statute, it will not be followed by the United States courts, but they will adhere to the general chancery rule.[16] And further, the application of even a local statutory rule in these cases may be restrained by the act of Congress which provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."[17] Hence it is held that a circuit court of the United States, as a court of equity, cannot entertain a suit by a purchaser of real estate at execution sale, who is not in possession, to set aside a prior conveyance made by the judgment debtor, as a cloud on complainant's title, on the ground that such conveyance was in fraud of creditors, and this, notwithstanding the fact that such a suit is permitted by a statute of the state. For if the conveyance sought to be set aside was fraudulent, it was void as to creditors, and complainant, by his purchase, acquired the legal title, and therefore has a plain, adequate, and complete remedy at law by an action of ejectment.[18]

[15] Harding v. Guice, 80 Fed. 162, 25 C. C. A. 352.
[16] Peck v. Ayers & Lord Tie Co., 116 Fed. 273, 53 C. C. A. 551.
[17] Rev. St. U. S. § 723 (U. S. Comp. St. 1901, p. 583).
[18] Morrison v. Marker (C. C.) 93 Fed. 692.

Distinction Between Law and Equity Preserved in Federal Courts

Since the Constitution of the United States, in the third article, recognizes a distinction between actions at law and suits in equity, it has ever since been held necessary to preserve this distinction in the federal courts, and to exclude from the equity side of the court all causes which were originally cognizable at common law, and from the law side those causes and defenses which were within the ancient and settled jurisdiction of chancery. This classification of actions is invariably observed in the United States courts, even when sitting in those states where legislation has broken down the barrier, by vesting equitable jurisdiction in the common-law courts or by enlarging the powers of chancery courts so as to include the administration of the common law.[19] It follows, therefore, with special reference to our present subject, that if a state statute authorizes the equity courts to take cognizance of actions properly triable at law, or if the interpretation of the statute by the courts of the state leads to the same result, neither the statute nor its construction is binding on the courts of the United States. Since they must strictly preserve the distinction between law and equity, no state law or decision can empower their equity side to try causes properly justiciable in courts of common law.[20] And conversely, an equitable defense cannot be maintained in a cause properly brought on the law side of a federal court, although, in the particular state, equitable defenses are

[19] Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Beatty v. Wilson (C. C.) 161 Fed. 453; Cook v. Foley, 152 Fed. 41, 81 C. C. A. 237; Jones v. Mutual Fidelity Co. (C. C.) 123 Fed. 506; Jewett Car Co. v. Kirkpatrick Const. Co. (C. C.) 107 Fed. 622; Gravenberg v. Laws, 100 Fed. 1, 40 C. C. A. 240; Berkey v. Cornell (C. C.) 90 Fed. 711.

[20] Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; Davidson v. Calkins (C. C.) 92 Fed. 230; American Ass'n v. Williams, 166 Fed. 17, 93 C. C. A. 1; Kansas City Southern Ry. Co. v. Quigley (C. C.) 181 Fed. 190.

admitted in that class of actions, either under a statute, or the decisions or procedure of the local courts.[21]

ADMIRALTY AND MARITIME LAW

201. In the exercise of their jurisdiction in admiralty and maritime cases, the federal courts are governed by the statutes of Congress and the general principles of the maritime law, but are not in any way bound or controlled by either the statutes or the judicial decisions of the states.

It was remarked by Mr. Justice Story, at an early day, that "in the exercise of their admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and, in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, or the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules, to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least so far as I have any knowledge, either by any state court or national court within the Union."[22] Hence the adjudications of the state courts in similar cases are not of any controlling authority in the federal courts. Thus, the construction of a policy of marine insurance, depending on questions of general commercial law, is a matter on which the courts of the United States are at liberty to exercise their own judgment, and are not bound to accept the decisions of the courts

[21] McManus v. Chollar, 128 Fed. 902, 63 C. C. A. 454; Seefeld v. Duffer, 179 Fed. 214, 103 C. C. A. 32.

[22] The Chusan, 2 Story, 455, Fed. Cas. No. 2,717.

of the state in which the contract was made.[23] And so, on the question of the allowance of interest in a libel upon a contract of marine insurance, the federal court is not to be guided by state statutes as to the method of ascertaining the proportions of a general average loss or as to the allowance of interest on contracts in general.[24] Again, upon a question of priority between a mortgage of a vessel and a lien given by a state statute for supplies and repairs in her home port, the determination of which depends upon principles of general jurisprudence and the construction of an act of Congress, and which arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution, those courts are not controlled by the decisions of the highest court of the state.[25] And so, a provision in a state statute that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons is served on him, does not apply to admiralty suits in the federal courts.[26]

[23] Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49.

[24] New Zealand Ins. Co. v. Earnmoor S. S. Co., 79 Fed. 368, 24 C. C. A. 644.

[25] The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Canada (D. C.) 7 Fed. 730.

[26] Laidlaw v. Oregon Ry. & Nav. Co., 81 Fed. 876, 26 C. C. A. 665.

CHAPTER XVIII

SAME; PROCEDURE AND EVIDENCE

202. Conformity Act and Its Effect.
203. Rules of Pleading.
204. Process and Jurisdiction.
205–206. Right of Action and Prerequisites to Suit.
207. Judicial Authority and Discretion.
208. Criminal Cases.
209. Rules of Evidence in General.
210. Competency of Witnesses.
211. Evidence in Criminal Cases.

CONFORMITY ACT AND ITS EFFECT

202. With certain specific exceptions, the courts of the United States are required to conform their practice, forms and modes of procedure, and rules of pleading, to those obtaining in the courts of record of the state wherein they sit; and in all such matters they are governed and controlled by the law of the state as found in its statutes and in the decisions of its courts, either construing such statutes or applying the doctrines of the common law.

Under Judiciary Act of 1789

The original act of Congress regulating the jurisdiction and procedure of the courts of the United States, enacted in 1789 and commonly called the "Judiciary Act," provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." [1] But it was the opinion of the federal courts (to which no exceptions have been noted) that the "laws of the several states" here referred to were such only as related to the substantial rights of

[1] Rev. St. U. S. § 721 (U. S. Comp. St. 1901, p. 581).

the parties, or affected a right or title in litigation, or established rules of property, and not such as related to mere matters of practice or modes of procedure. And hence, as to the latter,—or what is now frequently called "adjective law,"—they considered that they were not governed or controlled by either the statutes of the state or the decisions of its courts; that these rules or modes of procedure were not local laws, in such sense that either the act of Congress or the principle of comity required their adoption by the federal courts; and that they could become operative in the latter courts only by being formally adopted by a rule of court.[2] And so long as the practice generally obtaining in all the state courts was based upon the common-law forms and methods, it was well enough for the federal courts to disregard local peculiarities and make their own system harmonious and consistent. But this was changed when the states began to adopt codes of procedure, especially meant to reform and simplify the practice of the courts.

Conformity Act of 1872

In 1872, and probably in consequence of these changes in the state systems, Congress provided by law that "the practice, pleadings, and forms and modes of procedure in civil causes, other than admiralty and equity causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of procedure existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." [3] The effect of this statute is that the federal courts conform their practice, in all cases at common law, to that of the state in which they sit. If that state has adopted a code of procedure, proceedings in the federal courts,

[2] Amis v. Smith, 16 Pet. 303, 10 L. Ed. 973; City of Davenport v. Lord, 9 Wall. 409, 19 L. Ed. 704; Campbell v. Claudius, Pet. C. C. 484, Fed. Cas. No. 2,356; New England Screw Co. v. Bliven, 4 Blatchf. 97, Fed. Cas. No. 10,157; Curtis v. Smith, 6 Blatchf. 537, Fed. Cas. No. 3,505; Dunn v. Games, 2 McLean, 344, Fed. Cas. No. 4,177.

[3] Rev. St. U. S. § 914 (U. S. Comp. St. 1901, p. 684).

in actions at law, are governed by the code. If the state adheres to the common-law pleading and practice, the federal courts will do the same. And they will seek the law which is to govern them in these matters primarily in the statutes of the state, and secondarily in the decisions of its highest courts, whether the latter relate to the construction of such statutes or independently enunciate the rules and principles which are to be observed by the courts of the state in like cases. Generally speaking, therefore, the regularity of proceedings in any civil action in a federal court should be decided by the state laws and the decisions of the state courts.[4] Whether two persons jointly sued were properly joined as defendants is a question of practice to be determined according to the laws of the state.[5] So also is the question whether, on the death of a plaintiff, another party may be substituted after judgment and before suing out a writ of error.[6] So, whether a plaintiff in a federal court may dismiss his action without prejudice, is a matter regulated by the state statutes.[7] So if the law of the state provides that, in the peculiar action of ejectment, two successive verdicts and judgments in favor of the same party shall be necessary to constitute a bar to the maintenance of any further action on the same cause, the same rule will be applied in the United States court.[8] And a decision of the supreme court of a state that no amendment of its record in derogation of its final judgment must be made after the expiration of the term, is binding on the federal courts, even on the Supreme Court.[9] So again, a set-off may be pleaded as a defense to an action at law brought in the United States courts in any state where that plea is permissible by the laws of the state.[10] But matters of practice must be carefully distinguished from

[4] Republic Ins. Co. v. Williams, 3 Biss. 370, Fed. Cas. No. 11,707.

[5] Southern Ry. Co. v. Sittasen (Ind. App.) 74 N. E. 898. But see same case, 166 Ind. 257, 76 N. E. 973.

[6] Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629.

[7] Gassman v. Jarvis (C. C.) 94 Fed. 603.

[8] Gibson v. Lyon, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. Ed. 440.

[9] Fielden v. Illinois, 143 U. S. 452, 12 Sup. Ct. 528, 36 L. Ed. 224.

[10] Partridge v. Phœnix Mut. Life Ins. Co., 15 Wall. 573, 21 L.

questions of general law. Thus, in the federal circuit court in Massachusetts, a plaintiff brought suit against a defendant on a judgment recovered against him several years before in a local court. The defendant pleaded his discharge in bankruptcy, to which the plaintiff replied that the debt on which the judgment was founded was contracted by the fraud of the defendant, and therefore was not released by his discharge in bankruptcy. The question of law was therefore whether the original cause of action was so far merged in the judgment as to prevent the plaintiff from showing its nature and the circumstances surrounding it. On this point, the federal court held that it was bound to follow the law of the state as evidenced by the decisions of its courts; but its judgment was reversed by the circuit court of appeals.[11]

Exceptions

It should be noted that the Conformity Act, above recited and illustrated, expressly excepts from its operation causes in equity and in admiralty. In exercising their jurisdiction in such cases, the federal courts are entirely free from the control of state laws and state decisions, both in respect to the substance of the law which they administer and to the practice and modes of procedure. This was fully shown in the preceding chapter. Again, since the act expressly mentions procedure in "civil" causes, it is held to exclude the trial of criminal offenses. This point will be discussed in a subsequent section, as will also the important principle that the statute does not in any way pertain to or affect the jurisdiction of the federal courts or their process or the mode of obtaining jurisdiction of the person. And it is quite generally considered that the act of Congress was meant to apply only to the trial of causes in courts of first instance, and that it does not govern or apply to appellate jurisdiction or procedure.[12] It is of

Ed. 229; Frick v. Clements (C. C.) 31 Fed. 542; Arkwright Mills v. Aultman & Taylor Machinery Co. (C. C.) 128 Fed. 195.

[11] Packer v. Whittier (C. C.) 81 Fed. 335, reversed, 91 Fed. 511, 33 C. C. A. 658.

[12] Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 165 Fed. 162, 91 C. C. A. 196; Taylor v. Adams Express Co., 164 Fed. 616, 90

course to be understood, also, that this act should not be held applicable in respect to any matter of procedure upon which Congress itself has prescribed a definite rule, since its action in that regard would so far repeal or supersede the general provisions of the act.[13] And since the direction of the statute is not very rigorous, but only to the effect that pleading and practice in the federal courts shall conform "as near as may be" to the rules obtaining in the state courts, there are decisions holding that the laws and decisions of the state should not be followed when conformity to the state practice would tend to defeat justice in a particular case, or unwisely incumber the administration of justice in the federal courts.[14]

RULES OF PLEADING

203. In all actions at common law, and in the absence of specific provisions made by act of Congress, the rules of pleading in a federal court are the same as those in force in the courts of the state wherein it sits; and all questions concerning the necessity, time, effect, and sufficiency of pleadings will be determined in accordance with the law of the state, as shown by its statutes and the decisions of its courts.

The Conformity Act of 1872 expressly requires the inferior courts of the United States to conform to the laws of the state in which their sessions are held in respect to "pleadings" in all civil causes other than proceedings in

C. C. A. 526; Egan v. Chicago Great Western R. Co. (C. C.) 163 Fed. 344; Francisco v. Chicago & A. R. Co., 149 Fed. 354, 79 C. C. A. 292; Detroit United Ry. v. Nichols, 165 Fed. 289, 91 C. C. A. 257. But compare New York, N. H. & H. R. Co. v. Cockcroft (C. C.) 49 Fed. 3.

[13] Meyer v. Consolidated Ice Co. (C. C.) 163 Fed. 400; Smith v. Au Gres Tp., Mich., 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876; Allnut v. Lancaster (C. C.) 76 Fed. 131.

[14] Hein v. Westinghouse Air Brake Co. (C. C.) 164 Fed. 79; City of St. Charles v. Stookey, 154 Fed. 772, 85 C. C. A. 494.

admiralty or equity. Hence these courts must be governed by the local statutes, and by the decisions of the courts of the state, either expounding the meaning of such statutes or applying the rules of the common law, as the case may be, in the determination of all questions relating to either the form, substance, time, or effect of the pleadings in actions at common law. Thus, for instance, where the jurisdiction of a federal court is invoked on the ground of diverse citizenship of the parties, and this fact is duly alleged in the declaration or complaint, the course to be pursued by a defendant who means to deny it and put it in issue depends on the rules of pleading in force in the state courts. Specifically, these rules must furnish an answer to the question whether he must plead specially or may disprove the alleged diversity of citizenship under a general denial of "each and every allegation in the complaint contained." On this point it is remarked by the United States Supreme Court: "So long as the rules of pleading in the courts of the United States remained as at common law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant except by plea in abatement, and was admitted by pleading to the merits of the action. But since 1872, when Congress assimilated the rules of pleading, practice, and forms and modes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several states, all defenses are open to a defendant in the circuit court of the United States, under any form of plea, answer, or demurrer, which would have been open to him under like pleading in the courts of the state within which the circuit court is held." [15] So also the federal courts will look to state laws and decisions for the determination of questions concerning the construction of pleadings, and the force and effect of particular language used in them, and their sufficiency in respect to matters either of form or substance.[16] And so, in general, as

[15] Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579.
[16] Bryson v. Gallo, 180 Fed. 70, 103 C. C. A. 424; Castro v. De Uriarte (D. C.) 12 Fed. 250.

to questions which relate to the time and order of filing pleadings, the scope and effect of a demurrer, the right of the parties to amend their pleadings, when this does not depend upon the judicial discretion of the court, and all similar matters.[17]

PROCESS AND JURISDICTION

204. In respect to their jurisdiction and the mode of acquiring it in particular cases, and as to the sufficiency of process and of its service, the federal courts are not bound by state laws or decisions.

The statute under consideration does not pertain to nor affect the jurisdiction of the federal courts, which is fixed by the constitution and by various acts of Congress, nor does it relate to the mode of obtaining jurisdiction of the person.[18] Thus, a foreign creditor may establish his claim in the federal courts against the personal representatives of a decedent, although the state laws limit the right in such cases to proceedings in the proper probate court.[19] So also, the federal courts are not bound by a decision of the supreme court of a state that mandamus is the only proper remedy upon bonds of municipal corporations.[20] Nor can any state law, of its own force and vigor, affect the process of the courts of the United States.[21] But in respect

[17] Taylor v. Brigham, 3 Woods, 377, Fed. Cas. No. 13,781; Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806; Ricard v. Inhabitants of New Providence Tp. (C. C.) 5 Fed. 434; Dexter, Horton & Co. v. Sayward (C. C.) 51 Fed. 729.

[18] Wells v. Clark (C. C.) 136 Fed. 462, affirmed, Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. Ed. 138.

[19] Schurmeier v. Connecticut Mut. Life Ins. Co., 171 Fed. 1, 96 C. C. A. 107.

[20] Sanford v. Portsmouth, 2 Flip. 105, Fed. Cas. No. 12,315.

[21] Catherwood v. Gapete, 2 Curt. 94, Fed. Cas. No. 2,513. An act of the state legislature which prohibits the granting of a mandamus for the collection of judgments against a city, is not binding upon the federal courts, which derive their power to enforce their judgments in such cases by mandamus from the federal statute on the subject. United States v. Capdevielle, 118 Fed. 809, 55 C. C. A. 421.

to the form and style of process, the Conformity Act of 1872 now requires the "forms and modes of procedure in civil cases" to be assimilated to those of the particular state, except in so far as they are specifically governed by other federal statutes. And in respect to these matters the rules and decisions of the state courts will furnish a guide for the United States courts. Thus, for instance, in South Carolina there is a constitutional provision that all process shall run in the name of the state. But the courts of the state have decided that a summons is not a "process" within the meaning of the constitution and therefore need not be in the name of the state. Accordingly it is held that a summons issuing out of the federal circuit court in that state need not be in the name of the United States in order to conform to the procedure of the state.[22] In regard to the form and manner of serving process,—as, for example, in regard to service upon an officer or agent of a defendant corporation,—the federal courts conform to the practice locally prevailing.[23] But the question whether the court has lawfully acquired jurisdiction of the person of the defendant by the service that actually was made is a question of general jurisprudence, not of local law, and it is to be determined by the federal law and cannot be affected by state statutes or decisions.[24] So, where a case is removed from a state court into a federal circuit court, and the defendant appears specially, for the purpose of the removal only, and objects to the sufficiency of the service, the federal court must determine the objection for itself, and will not necessarily be controlled by the state law.[25] But, within the limitations and subject to the exceptions provided by the applicable acts of Congress, a federal court may by rule adopt the state statute relating to service of process in actions at law, and when this is done, it is bound by the construction placed on the statute by the supreme

[22] Chamberlain v. Mensing (C. C.) 47 Fed. 435.

[23] Miller v. Norfolk & W. R. Co. (C. C.) 41 Fed. 431; Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946.

[24] New Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C.) 130 Fed. 605.

[25] West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.) 170 Fed. 349.

court of the state. And where the latter court has decided that a sheriff's return, showing that he has made service as prescribed by the statute, is conclusive as against collateral attack by a resident of the state, the same doctrine will be applied by the federal court.[26]

It should be noted that cases may arise as to the sufficiency of process or its service, or the essentials of jurisdiction, in which the federal courts will be precluded from an independent investigation and decision by the peculiar doctrine of the "law of the case." Thus, in one case, a suit was brought in a state court to settle an alleged co-partnership between the plaintiffs and a deceased partner, and a decree was made directing a sale of the property of the decedent. But one of the parties was an infant, who had succeeded to an undivided interest in the property of the deceased partner, and the supreme court of the state decided that there had been no sufficient service on him, and consequently that the lower court had not possessed authority to appoint a guardian ad litem for him, and for this reason the decree was reversed. Afterwards an action was brought in the United States circuit court, by a grantee of the heirs of the deceased against the purchaser at the sale under the decree, and it was held that the decision of the state court as to jurisdiction over the infant was binding on the federal court as the law of the case.[27]

Neither must the fact be overlooked that the Conformity Act applies only to "civil causes other than admiralty and equity causes." In the two instances excepted, the practice and forms and modes of procedure of the United States courts are not assimilated to those of the states, but are entirely independent of them. Hence, for example, an act of a state legislature authorizing suits to be sustained by or against steamboats by name, does not confer any right to bring actions in this form in the federal courts.[28]

[26] Joseph v. New Albany Steam Forge & Rolling-Mill Co. (C. C.) 53 Fed. 180.

[27] Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

[28] The Burns, 9 Wall. 237, 19 L. Ed. 620.

RIGHT OF ACTION AND PREREQUISITES TO SUIT

205. Rights of action created by state statutes may be enforced in the federal courts if otherwise within their jurisdiction, and in such cases, the judgments of the state courts construing such statutes will be of controlling authority.

206. Formal prerequisites to the maintenance of particular kinds of actions, required by the state law, will be observed in similar cases in the federal courts; but no restrictions or limitations imposed upon the right to sue, by state statutes, can operate to deprive the United States courts of any portion of the jurisdiction vested in them by the federal constitution and laws.

If the jurisdictional requisites as to the diverse citizenship of the parties and the amount in controversy are satisfied, a federal court may entertain a suit upon a cause of action which did not exist at common law, but is wholly the creation of a state legislature, such, for instance, as an action based on negligence or wrongful act causing the death of a human being.[29] And in such cases, as a matter of course, and just as in the case of any other statutes, the decisions of the courts of the state construing and applying the statute will be of controlling authority in the federal courts. So, where the right of a third person to sue upon a contract in which he is not named but which was made for his benefit is fully established in a particular state by the decisions of its courts, such an action may be maintained in the federal courts sitting in that state, and the rule of the state courts is controlling upon them.[30] If

[29] Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571; Dennick v. Central R. Co. of New Jersey, 103 U. S. 11, 26 L. Ed. 439; American Steamboat Co. v. Chace, 16 Wall. 522, 21 L. Ed. 369.

[30] Bethlehem Iron Co. v. Hoadley (C. C.) 152 Fed. 735.

the state law, in giving a right of action, requires certain formal steps to be taken as preliminary to the institution of suit, this is a limitation upon the right of action, or at least upon the right of the plaintiff, which will be respected and enforced by the federal courts, provided it does not operate to abridge the jurisdiction vested in them, independently of state laws, by the national constitution and the acts of Congress. For instance, an action in a federal court against a county for the infringement of a patent, is subject to a state statute requiring a demand against a county for unliquidated damages to be presented to the board of supervisors of the county, with a demand of payment, before bringing suit upon it.[31] So a federal court cannot enforce the statutory liability of a non-resident stockholder of a foreign corporation at the suit of a receiver of its assets, where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder.[32] But although the statutes of a state may provide that actions of a given class, or actions on a designated class of obligations or torts, shall be brought only in certain of its own courts, or that particular courts of the state shall have exclusive jurisdiction of such suits, this cannot apply to the courts of the United States; nor will such statutes prevent the federal courts from taking cognizance of such actions, when the necessary conditions are complied with, and when the facts essential to their jurisdiction are present.[33] Thus, where a state statute creates a right of action for damages for personal injuries under certain circumstances, an action, founded on the statute, between citizens of different states, may be

[31] May v. Buchanan County (C. C.) 29 Fed. 469.

[32] Evans v. Nellis, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. Ed. 173.

[33] Hyde v. Stone, 20 How. 170, 15 L. Ed. 874; Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; George T. Smith Middlings Purifier Co. v. McGroarty, 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346; Bigelow v. Nickerson, 70 Fed. 113, 17 C. C. A. 1, 30 L. R. A. 336; Elliott v. Shuler (C. C.) 50 Fed. 454; Davenport v. Moore (C. C.) 74 Fed. 945; Oliver v. Omaha, 3 Dill. 368, Fed. Cas. No. 10,499.

maintained in a federal court, notwithstanding the statute assumes to limit the remedy to suits in the courts of the state.[34] So a proceeding against an executor or administrator to enforce the payment of a debt due by the decedent in his lifetime, or to recover a distributive share of the estate, may be maintained in a federal court, provided the parties are citizens of different states and the amount in controversy is sufficient to give jurisdiction, although the state statute regulating such matters purports to confine the jurisdiction over such actions exclusively to the probate court which granted the letters.[35] On the same principle, although the state statute may provide that actions against municipal corporations of the state shall be brought only in certain designated courts of the state, they may nevertheless be sued in the federal courts by citizens of other states.[36] And a state statute which provides that no action shall be brought on a judgment rendered in any court of the state without leave of that court first obtained, has no application to a suit on such a judgment in a federal court by a non-resident owner of it; for a person who has a right to sue in the national courts cannot be compelled by an act of a state legislature first to obtain leave of a state court.[37]

JUDICIAL AUTHORITY AND DISCRETION

207. The federal courts are not controlled by state laws or decisions in respect to matters which lie within their judicial authority or discretion.

[34] Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571.

[35] Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; Hess v. Reynolds, 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Schurmeier v. Connecticut Mut. Life Ins. Co., 171 Fed. 1, 96 C. C. A. 107.

[36] Mercer County v. Cowles, 7 Wall. 118, 19 L. Ed. 86; Thompson v. Searcy County, 57 Fed. 1030, 6 C. C. A. 674.

[37] Phelps v. O'Brien County, 2 Dill. 518, Fed. Cas. No. 11,078; Union Trust Co. v. Rochester & P. R. Co. (C. C.) 29 Fed. 609. A

This rule is plainly necessary to preserve the proper independence of the federal courts. While useful purposes are subserved by requiring them to conform to the laws and practice of the particular state in formal and routine matters of pleading and procedure, it was not the intention of Congress, in the Conformity Act, that they should be hampered or bound by any state laws in regard to such matters as rest within the judicial discretion of a judge or form part of the inherent authority of a court as such. Hence, for instance, neither the statutes of a state nor the decisions of its courts in relation to instructions or charges to juries are binding on the United States courts.[38] And the same is true of a state law defining or limiting the conditions under which a new trial may be granted,[39] or one regulating the award of costs in civil cases,[40] or directing that juries shall be required to make a separate assessment of exemplary damages in cases where such damages are allowable.[41] So also it is said that the question whether a court has, under the rules of the common law, the power to compel a plaintiff in an action for personal injuries to submit to a surgical examination is a matter of practice and not of evidence, and as a matter of practice relating to the power of the courts, neither state statutes nor the decisions of state courts on the subject are binding on the federal courts.[42]

state statute which authorizes suits to be brought against receivers without leave of court only affects receiverships pending in the state courts, and does not affect the common-law rule to the contrary applying to receivers appointed by a federal court. Morse v. Tackaberry (Tex. Civ. App.) 134 S. W. 273.

[38] Hankin v. Squires, 5 Biss. 186, Fed. Cas. No. 6,025. And see, in general, St. Louis, I. M. & S. R. Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Town of Lyons v. Lyons Nat. Bank (C. C.) 8 Fed. 373; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898.

[39] Hughey v. Sullivan (C. C.) 80 Fed. 72.

[40] Costs in Civil Cases, 1 Blatchf. 652, Fed. Cas. No. 18,284.

[41] Times Pub. Co. v. Carlisle, 94 Fed. 762, 36 C. C. A. 475.

[42] Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422.

CRIMINAL CASES

208. The act of Congress requiring the pleadings, practice, and forms and modes of procedure in the inferior federal courts to conform to those prevailing in the courts of the several states has no application to the trial of criminal offenses.

Crimes against the United States can be such only as are created by the constitution or by an act of Congress. The substantive criminal law of the general government is therefore entirely independent of state laws. So also the law relating to indictments and pleas, the composition of juries, testimony, and the entire procedure of a criminal trial in the federal courts is equally independent of rules and precedents prevailing in the courts of the state where they sit.[48] That this should be so is a necessary implication from the language of the Conformity Act of 1872, which is expressly restricted to "civil causes, other than admiralty and equity causes," the antithesis of "civil" being necessarily and of course, in this connection, "criminal." But even without regard to this statute, the rule must be the same, since, in the exercise of their jurisdiction in criminal cases, the federal courts proceed wholly under and by the authority of national law, and there is nothing local or territorial in the rules or principles which should govern them, nor any propriety in adopting local peculiarities of practice. The law which they administer in these cases, in fact, is not the law of the state where they sit, but the law of the United States. As remarked by a learned judge in one of the circuit courts: "In the administration of criminal law, unless there be an express statute to the

[48] In re Tracy & Co. (D. C.) 177 Fed. 532; United States v. Hughes (D. C.) 175 Fed. 238; Jones v. United States, 162 Fed. 417, 89 C. C. A. 303; United States v. Kerr (D. C.) 159 Fed. 185; Lang v. United States, 133 Fed. 201, 66 C. C. A. 255; Withaup v. United States, 127 Fed. 530, 62 C. C. A. 328; Hanley v. United States, 123 Fed. 849, 59 C. C. A. 153; United States v. Kilpatrick (D. C.) 16 Fed. 765; United States v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671.

contrary, we are governed by the general common-law procedure. In the administration of criminal law and in criminal jurisprudence, we go to the common law for the purpose of ascertaining the modes of practice, the modes of procedure, the rights of the defendant, the duty of the court, and the duty of the jury, and we administer it according to that." [44]

It is to be understood that the foregoing applies only to the trial of criminal offenses against the United States. When a question concerning the criminal law of the state, or its administration, comes incidentally before a federal court, the latter will be guided by the local law. Thus, the question what constitutes a misnomer in a criminal complaint or warrant for violation of the laws of the state is a local question, as to which the federal courts will follow the settled rule of the state courts, in the absence of any statute.[45]

RULES OF EVIDENCE IN GENERAL

209. Except as to matters specially regulated by act of Congress, the federal courts adopt and apply the rules of evidence prevailing in the state where they sit, whether founded on statutes of that state or on the decisions of its courts declaring and applying the common-law rules.

Regulation by Act of Congress

To a considerable extent, the subject of evidence in the federal courts has been specifically regulated by various acts of Congress, relating to the mode of receiving testimony, the competency of witnesses, the admissibility of particular evidence, and the burden of proof in certain cases. For these provisions reference should be made to the Revised Statutes. As to these matters the rule has been categorically stated that, when the statutes of the United States make special provisions as to the competency or

[44] Erwin v. United States (D. C.) 37 Fed. 470, 2 L. R. A. 229.
[45] O'Halloran v. McGuirk, 167 Fed. 493, 93 C. C. A. 129.

admissibility of testimony, they must be followed in the courts of the United States, and not the laws or the practice of the courts of the state in which the court is held, if they are different.[46] This is also the rule where the solution of a question of evidence must depend upon the construction of an act of Congress relating to other subjects. Thus, on the question of the admissibility in evidence of instruments which were not stamped, as they were required to be by the War Revenue Act of 1898, the decisions of the state courts have no controlling influence in the federal courts.[47] But in a suit by a client against his attorney who has received money for the client under an award against the United States, the question whether the award and the receipt for the money paid under it are admissible in evidence, depends either upon the local or the general law of evidence, but in any case does not present a federal question.[48]

Regulation by State Statute

Where a state statute makes specific provision as to the introduction, admissibility, or effect of particular evidence, it will be adopted and applied by the federal courts in that state in the trial of civil suits (as also the decisions of the state courts construing it), provided it is not in conflict with any rule established on the same subject by act of Congress.[49] It is not necessary that the state law should be merely in affirmance of the rule of the common law; although it may be directly contrary to the common-law rule, it is none the less obligatory on the federal courts.[50] And an authoritative ruling of the highest court of the state upon its interpretation will be equally obligatory, although

[46] Whitford v. Clark County, 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500.

[47] Sackett v. McCaffrey, 131 Fed. 219, 65 C. C. A. 205.

[48] Sherman v. Grinnell, 144 U. S. 198, 12 Sup. Ct. 574, 36 L. Ed. 403.

[49] Fowler v. Hecker, 4 Blatchf. 425, Fed. Cas. No. 5,001; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643. See an early decision to the contrary in Craig v. Brown, 3 Wash. C. C. 503, Fed. Cas. No. 3,330.

[50] Fowler v. Hecker, 4 Blatchf. 425, Fed. Cas. No. 5,001.

the federal court may think it erroneous in principle or contrary to sound rules of statutory construction.[51] For example, a state law which authorizes the admission in evidence of the testimony of a witness given on a former trial of the same case, when the witness is dead or beyond the jurisdiction of the court, is not in conflict with any federal statute, and may properly be applied in an action at law in a federal court sitting within the state, where the witness is without the district and more than one hundred miles distant from the place of trial.[52] So the federal courts will follow the decisions of the state supreme court as to the admissibility in evidence of certified copies of deeds, without accounting for the absence of the originals, and as to the various curative acts concerning deeds improperly or defectively acknowledged, and as to the force and effect of the recording acts of the state.[53] Again, a state statute requiring each party in an action of ejectment to file with his pleading copies of all deeds or other written instruments of title on which he relies, and providing that the adverse party shall, by his pleading, except to any of such documentary evidence to which he may wish to object, which exceptions shall be passed on by the court, and that all objections not so taken shall be waived, prescribes a statutory rule of evidence which will be enforced by the federal courts in the state.[54]

Common-Law Rules

There are some decisions to the effect that the decisions of the courts of a state construing common-law rules of evidence are not obligatory on the federal courts, that such decisions are merely persuasive authority, and while the federal courts will follow them when the question at issue is balanced with doubt, yet they will not be governed by such decisions when they appear to be at variance with the great weight of authority.[55] But the majority of the

[51] Wright v. Taylor, 2 Dill. 23, Fed. Cas. No. 18,096.

[52] Toledo Traction Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28.

[53] Wright v. Taylor, 2 Dill. 23, Fed. Cas. No. 18,096.

[54] Alexander v. Gordon, 101 Fed. 91, 41 C. C. A. 228.

[55] Union Pac. Ry. Co. v. Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553 (as to the propriety of reading medical books to the

cases on the point hold a contrary view. They make no distinction between a local rule of evidence which is based on a local statute and one which is settled by the adjudications of the local courts, holding either to be imperative as a "law" of the state and in that sense binding on the federal courts, provided only that it is not in conflict with any act of Congress.[56]

COMPETENCY OF WITNESSES

210. Questions concerning the competency of witnesses, in trials in the federal courts at common law and in equity and admiralty, are to be determined in accordance with the law of the state in which the court is held, except as to certain matters specifically regulated by act of Congress.

The federal statute on this subject provides that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of

jury as independent evidence of the opinions therein expressed); Harding, Whitman & Co. v. York Knitting Mills (C. C.) 142 Fed. 228 (as to varying a written contract by parol evidence).

[56] McNiel v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009; Wright v. Bales, 2 Black, 535, 17 L. Ed. 264; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; In re Fisk, 113 U. S. 720, 5 Sup. Ct. 724, 28 L. Ed. 1117; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Hinds v. Keith, 57 Fed. 10, 6 C. C. A. 231; Pooler v. United States, 127 Fed. 519, 62 C. C. A. 317; Stewart v. Morris, 89 Fed. 290, 32 C. C. A. 203; City of Chicago v. Baker, 86 Fed. 753, 30 C. C. A. 364; United States v. Dunham, Fed. Cas. No. 15,006.

the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." [57] In regard to this rather involved statute, it should be remarked, in the first place, that the provision against the exclusion of a witness on account of color applies to "any action," and since this expression is contrasted with the phrase "any civil action" in the following clause, it is evident that the removal of a disqualification arising out of race was meant to be available in criminal as well as civil trials, while the removal of the disqualification of interest is restricted to civil suits, apparently excluding criminal trials. In the next place, it may be open to question whether the phrase "civil action," as here used, includes proceedings in equity. But apparently it does, judging from the broad nature of the phrase itself and from the fact that Congress, in other similar statutes, has been careful to distinguish between "trials at common law" and equity suits. In the next place, the direction that, in other respects than those specified, the competency of witnesses shall be determined according to the laws of the several states extends to proceedings in equity and admiralty as well as to trials at common law, but excludes criminal trials. Finally, it will be observed that the provision shutting out testimony as to transactions with, or statements by, a deceased person or a ward is an exception to the more general provision removing the disqualification of interest, and that this exception is itself made subject to an exception, namely, that such testimony may be given when the witness is called by the opposite party, or when the court requires him to testify.

As to all the particular matters regulated by this statute, the statute itself must govern in all proceedings in the federal courts, the laws and decisions of the state in which the court is sitting being entirely disregarded, or rather, having no constraining force whatever as against the express terms of the federal statute.[58] Thus, although the

[57] Rev. St. U. S. § 858 (U. S. Comp. St. 1901, p. 659).

[58] Whitford v. Clark County, 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500; Potter v. Third Nat. Bank, 102 U. S. 163, 26 L. Ed. 111;

local statute may absolutely and in all events disqualify a witness from testifying to conversations or personal transactions had with a person since dead, yet this has no effect in the federal courts, where, under the act of Congress, such testimony is admissible when the witness is called by the opposite party or required by the court to give his evidence.[59] And so, on the other hand, since congress has seen fit to remove the disqualification of interest, with a single exception (in suits by or against executors, etc.), its legislation must be regarded as exclusive, and the exception cannot be enlarged or added to by the statutes of any state.[60] But the exception must be restricted to its proper antecedent. And in this light it has been held that the federal statute does not provide for the particular case covered by a statute in force in Indiana, which excludes, as against the heirs or representative of a decedent, the testimony of one who has acted as an agent in making or continuing a contract with such decedent; and therefore the local statute may and should be accepted as a rule of decision as to the competency of the witness in this particular case in the federal courts.[61]

The statute provides that, "in other respects" than those particularly mentioned, the laws of the state in which the court is held shall determine questions as to the competency of witnesses in the federal courts. This applies as well to suits in equity as to actions at law.[62] But this part of the statute is not regarded as imposing a new duty on the courts of the United States, or creating a new rule for their government, at least so far as regards suits at common law. It merely affirms, or gives the sanction of Congress to, a rule which they had already regarded as binding on them. For it was the accepted doctrine that, in regard to the competency of witnesses, as in regard to other questions in the law of evidence, the federal courts were bound

Goodwin v. Fox, 129 U. S. 631, 9 Sup. Ct. 367, 32 L. Ed. 805; Morris v. Norton, 75 Fed. 912, 21 C. C. A. 553.

[59] Travis v. Nederland Life Ins. Co., 104 Fed. 486, 43 C. C. A. 653.

[60] White v. Wansey, 116 Fed. 345, 53 C. C. A. 634.

[61] Continental Nat. Bank v. Heilman (C. C.) 81 Fed. 36.

[62] Rowland v. Biesecker (C. C.) 181 Fed. 128.

to observe the statutes and decisions of the state wherein they sat, under the provision of the original Judiciary Act of 1789, that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Thus, before the passage of this act of Congress, it was decided that if the laws of a particular state allowed parties to an action to be examined as witnesses in their own behalf, they constituted a rule which the federal courts in that state were bound to adopt and apply, though contrary to common-law doctrines and contrary to a specific rule of the federal courts.[63] There are numerous other restrictions in the laws of the several states which this act of Congress makes operative in the federal courts. For example, the question whether a wife may be required or permitted to testify for or against her husband in a civil suit, or vice versa, depends upon the local law. If such testimony is admitted in the state courts, it must also be admitted in the federal courts in that state; if excluded in the one, it must be excluded in the other.[64] Thus, where the law of the state provides that a wife shall not be examined as a witness for or against her husband without his consent, nor as to any communication made to her by him during the marriage relation, the wife of a bankrupt, under examination as a witness in the bankruptcy proceedings, cannot be required to disclose any communications made to her by her husband respecting his property or his income.[65] So also, the United States courts will give effect in proceedings before them, to a law of the state which prohibits the disclosure of instructions given by a testator to an attorney employed to draw his will,[66] and to one which protects taxpayers

[63] Ryan v. Bindley, 1 Wall. 66, 17 L. Ed. 559; Dibblee v. Furniss, 4 Blatchf. 262, Fed. Cas. No. 3,888.

[64] Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. Ed. 406; Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779; Wooster v. Hill (C. C.) 22 Fed. 830.

[65] In re Jefferson (D. C.) 96 Fed. 826.

[66] Butler v. Fayerweather, 91 Fed. 458, 33 C. C. A. 625.

from the introduction in evidence against them of the sworn inventories of their property which they are required to file, by prohibiting the assessors of taxes from disclosing the contents of such inventories and forbidding the municipal officers having the custody of them from producing or exhibiting them.[67] So again, if the local statute provides that a practising physician or surgeon shall not be permitted to disclose any information which he acquired while attending a patient in his professional capacity and which concerned the patient's ailment or was necessary to enable him to prescribe for him or treat him, this rule is obligatory upon the federal courts in that state, and will be observed and enforced whenever a physician is called as a witness in a civil proceeding in those courts,[68] and the question whether the relation of physician and patient so existed as to exclude the former's testimony in such cases depends upon the construction of the state statute, and as to this, the decisions of the highest court of the state, if any there be, will be accepted by the federal courts as absolutely binding on them.[69]

EVIDENCE IN CRIMINAL CASES

211. The rules of evidence governing the federal courts in criminal cases are those which were in force in the particular state at the time the federal courts were established therein, subject to such changes as have been made by act of Congress in regard to particular matters, but not affected by subsequent state laws or decisions.

In several particulars the common-law rules of evidence, as applicable to the trial of criminal offenses, have been changed by the legislation of Congress. But aside from

[67] Witters v. Sowles (C. C.) 32 Fed. 130.

[68] Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708. But see Doll v. Equitable Life Assur. Soc. of the United States, 138 Fed. 705, 71 C. C. A. 121.

[69] Supreme Lodge K. of P. v. Meyer, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146.

these matters, it was early declared by the United States Supreme Court that the courts of the federal system would be governed, in the trial of criminal actions and proceedings, by the law of the particular state in which they were held, as the same existed at the time of the establishment of the federal circuit and district courts by the enactment of the original Judiciary Act of 1789, the laws of the several states applicable to such matters then exhibiting some local variations or differences, but being substantially, and to all practical intents and purposes, identical with the common law.[70] Thus, in Pennsylvania, in 1789, a person convicted of and sentenced for any infamous crime was incompetent to testify as a witness in the state courts; and therefore a person in that situation is held incompetent to testify in criminal trials subsequently held in the federal courts sitting in that state.[71] In regard to the newer states, it is not quite so clear whether the federal courts, in criminal cases, should administer the rules of evidence in force in their courts at the time of their coming into the Union, or should revert to the common-law rules of 1789. But the opinion has been judicially advanced, in the case of Colorado, that the rules of evidence governing the federal courts there held, in such cases, are those which were in force in the territory at the time it was admitted as a state and created a federal district.[72] Generally speaking, however, and neglecting unimportant local variations, it is the common law of England, modified only by the statutes of Congress, which prevails in regard to the competency of witnesses and the admissibility of evidence in criminal cases in the United States courts.[73] It is clearly established that no act of Congress requires those courts to follow or adopt subsequent state laws or decisions as their guide in

[70] United States v. Reid, 12 How. 361, 13 L. Ed. 1023. And see United States v. Nye (C. C.) 4 Fed. 890; United States v. Hughes (D. C.) 175 Fed. 238; Erwin v. United States (D. C.) 37 Fed. 470, 2 L. R. A. 229.

[71] United States v. Hughes (D. C.) 175 Fed. 238.

[72] Withaup v. United States, 127 Fed. 530, 62 C. C. A. 328.

[73] Erwin v. United States (D. C.) 37 Fed. 470, 2 L. R. A. 229; Lang v. United States, 133 Fed. 201, 66 C. C. A. 255.

these cases. The thirty-fourth section of the Judiciary Act of 1789 applies only to "trials at common law." The act of 1864 applies to "trials at common law and in equity and admiralty." The Conformity Act of 1872 applies to "civil causes other than equity and admiralty causes." All of these, by necessary implication, exclude the trial of criminal offenses.[74] Hence no state statute nor any decision of its courts subsequent to 1789 (or at any rate subsequent to its admission as a state) can affect the rules of criminal evidence in the federal courts.[75] Thus, for instance, a state statute requiring corroboration of the testimony of an accomplice in a criminal case is not applicable to a prosecution in a federal court, which, in the absence of a statute of the United States on the subject, is governed by the common-law rule.[76]

[74] United States v. Brown, 1 Sawy. 531, Fed. Cas. No. 14,671.

[75] Withaup v. United States, 127 Fed. 530, 62 C. C. A. 328; Hanley v. United States, 123 Fed. 849, 59 C. C. A. 153; Lang v. United States, 133 Fed. 201, 66 C. C. A. 255.

[76] Hanley v. United States, 123 Fed. 849, 59 C. C. A. 153.

CHAPTER XIX

EFFECT OF REVERSAL OR OVERRULING OF PREVIOUS DECISION

212. Retrospective Effect in General.
213. The Law of the Case.
214. Saving of Vested Rights and Contracts.
215. Same; Showing Individual Rights and Injury.
216. Same; Taxation and Exemption.
217. Effect on Existing Judgments.

RETROSPECTIVE EFFECT IN GENERAL

212. A decision of a court of last resort overruling a former decision is, as a general rule, retrospective in its operation, and restores the rule or principle of law supposed to have been in force before the overruled decision was made.

According to the theory of judicial precedents, as already stated in these pages, the decision of a court of final authority becomes a part of the law of the state, or, at the least, it is indisputable evidence of what the law is. But if the decision was wrong and a mistake, it has no power to change the existing law or to make that a part of the law which was not so before. Undoubtedly it must stand as an authoritative declaration of the law until it is reversed by a higher court or until the court which made it shall entertain and declare a different view of the law. But when this comes to pass, and the earlier decision is overruled, it is simply swept out of the way. The theory is, not that the overruled decision made law, which is changed by the later decision, but that the earlier decision, being a mistake, never was the law, but that the law is and has always been as expounded in the later decision.[1] This,

[1] Town of Hardinsburg v. Cravens, 148 Ind. 1, 47 N. E. 153; Mason v. A. E. Nelson Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635; Center School Tp. v. State ex rel. Board of Com'rs, 150 Ind. 168, 49 N. E. 961.

it will be seen, is not at all like changing the existing body of law by the repeal of a statute; it is more like "removing a cloud" from the law. It does not regard the prior decision as law, though bad law, which must be altered, but as mere color of law without any substance. Hence the overruling of a decision relates back to the date of the overruled decision, operating retrospectively upon all transactions which can be reached by it, and the prior decision stands as though it had never been made.[2] "The overruling of a precedent," says Professor Salmond, "is not the abolition of an established rule of law; it is an authoritative denial that the supposed rule of law has ever existed. The precedent is so treated, not because it made bad law, but because it has never in reality made any law at all. It has not conformed to the requirements of legal efficacy. Hence it is that the overruling of a precedent, unlike the repeal of a statute, has retrospective operation. The decision is pronounced to have been bad ab initio."[3] Thus, for example, if the supreme court of a state holds an act of the legislature to be unconstitutional, so long as that decision remains unreversed, the act must be regarded and treated as invalid; but if the court shall afterwards come to the conclusion that its former decision was erroneous and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly.[4] So again, a tender by a mortgagor in United States legal-tender notes, made before the commencement of foreclosure proceedings, must be regarded as a valid tender, although made at a time when the law, according to the existing decisions, did not regard such notes as a legal tender, because the subsequent decision of the Supreme Court of the United States, making them a legal tender, is retrospective as to all transactions within its reach.[5] It can be very readily perceived that the conse-

[2] Boyd v. State, 53 Ala. 601; Taliaferro v. Barnett, 47 Ark. 359, 1 S. W. 702.

[3] Salmond, Jurisprudence (2d Ed.) p. 170.

[4] Pierce v. Pierce, 46 Ind. 86.

[5] Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56.

quences of overruling a prior decision may thus be momentous. In view of the necessary retroactive effect, such a step may easily unsettle grave affairs and throw important rights and interests into confusion and embarrassment. Hence the great reluctance of the courts to take the responsibility of overruling earlier decisions, and their frequently expressed opinion that it is better for them not to meddle with a decision which has become a rule of property, even though satisfied that it was wrong, because the mistake can be quite as effectively corrected by an act of the legislature, with the additional advantage that a statute need not be made retrospective, but can save all past acts and transactions and apply only to future cases. But if the expurgation of the mistaken decision is undertaken by the court, the overruling decision will be carefully restricted to the necessities of the case. Thus the fact that a supreme court overrules one proposition of an earlier decision should not be taken as an argument or suggestion of unsoundness as to other separate and distinct propositions declared therein.[6]

THE LAW OF THE CASE

213. Though a decision may be overruled with respect to the abstract rule or principle of law announced, that does not impair its conclusive effect as a judgment in the particular case in which it was made, or prevent it from continuing to be the law of that case.

A final judgment once solemnly pronounced by a court of competent jurisdiction is res judicata, between the parties and their privies, as to all issues and matters in controversy in the case, and it retains this conclusive effect notwithstanding the fact that a subsequent decision declares that the rule or principle of law upon which it proceeded was wrong or was mistakenly applied to the facts of the case. In other words, when a judicial decision, re-

[6] Pennington v. Gillaspie, 63 W. Va. 541, 61 S. E. 416.

garded as a proposition of law, is overruled, in a subsequent proceeding between other parties, this does not destroy its effect as an estoppel nor throw open the former litigation.[7] And further, in spite of the fact that a decision has been overruled as incorrect, it will continue to be the law of the particular case in which it was made, and will be followed in all subsequent proceedings in that same case, although it can no longer have any conclusive effect on other parties having rights depending on the same question.[8] Thus where the supreme court of a state decides that suits to recover back taxes paid can be brought only against the officer making the collection, and a suit of that character is so brought, and thereafter the court overrules its former decision, the pending suit should be permitted to proceed without objection on that ground.[9] So where the supreme court reverses the law as laid down in a prior decision, and the defendant in a criminal case may have acted on the advice of counsel, based on the law as declared in the first opinion, a new trial will be ordered, in order that he may establish his defense in accordance with the former ruling, if he is entitled to do so, although the new construction put upon the statute will be applied to all future cases.[10] So a party in an action at law who accepts the decision of an intermediate appellate court that his remedy is in equity, instead of taking the opinion of the court of last resort thereon, makes the decision the law of the case, and his right to sue in equity is not defeated by a subsequent decision of the court of last resort in a similar case, establishing the rule that the remedy is at law, although that decision may control as to the amount of the recovery.[11]

[7] State ex rel. Wright v. Savage, 64 Neb. 684, 91 N. W. 557.

[8] Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N. W. 1066; Reeve v. Colusa Gas & Electric Co., 151 Cal. 29, 91 Pac. 802; McMaster v. Dyer, 44 W. Va. 644, 29 S. E. 1016; State ex rel. Moore v. Board of Com'rs of Clinton County, 162 Ind. 580, 68 N. E. 295; Harris v. Jex, 55 N. Y. 421, 14 Am. Rep. 285.

[9] Kelley v. Rhoads, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594, 75 Am. St. Rep. 904.

[10] State v. Bell, 136 N. C. 674, 49 S. E. 163.

[11] Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 76 N. J. Eq. 347, 74 Atl. 144.

SAVING OF VESTED RIGHTS AND CONTRACTS

214. Where rights of property have accrued, and contracts have been made, in reliance upon the law as declared by a decision of the court of last resort, and were valid at the time of their inception under such decision, a subsequent decision, overruling the prior decision and reversing the rule of law thereby established, will not be allowed to retroact so as to destroy those rights or invalidate those contracts.

"We hold the doctrine to be sound and firmly established," says the Supreme Court of Alabama, "that rights to property and the benefits of investments acquired by contract, in reliance upon a statute as construed by the supreme court of the state, and which were valid contracts under the statute as thus interpreted, when the contracts or investments were made, cannot be annulled or divested by subsequent decisions of the same court overruling the former decisions; that as to such contracts or investments, it will be held that the decisions which were in force when the contracts were made had established a rule of property, upon which the parties had a right to rely, and that subsequent decisions cannot retroact so as to impair rights acquired in good faith under a statute as construed by the former decisions."[12] Although the opinion here quoted related to decisions upon the construction of statutes, the general principle laid down is by no means confined to precedents of that character, but is applied generally by the courts, in overruling former decisions, for the saving of rights and contracts, whether they grew out of a statute or rested upon the judicial interpretation of the common law.[13] The general principle is that a person who acts in

[12] Farrior v. New England Mortgage Security Co., 92 Ala. 176, 9 South. 532, 12 L. R. A. 856.

[13] Ohio River R. Co. v. Fisher, 115 Fed. 929, 53 C. C. A. 411; In re Dunham, Fed. Cas. No. 4,146; Center School Tp. v. State ex rel. Board of School Com'rs, 150 Ind. 168, 49 N. E. 961; Hibbits

accordance with the law as laid down by the highest tribunal in the state, while it is still the law, shall not suffer because it is subsequently set aside.[14] Thus, if the validity of a contract depends upon the construction of a statute or upon its constitutionality, it is to be tested by the state of the judicial decisions existing at the time it was made, and a subsequent change of opinion on the part of the courts will not be allowed to impair the obligation of that contract,[15] but it will continue to be recognized as valid, if valid at its inception, and it will be given the same effect as if no change in the decisions had taken place.[16] And on the same principle, contracts made on the faith of the law as enunciated in a decision of the court of last resort, in the absence of fraud, misrepresentation, or want of knowledge of the facts, will not be set aside because of a subsequent decision of the same court overruling the former one, since a mistake of law is no ground for relief.[17] So again, where municipal bonds were adjudged to be valid at the time of their issue, by the judgment of the highest court of the state, and have passed into the hands of bona fide holders for value, who purchased in reliance on that decision, their owners cannot be prevented from enforcing them notwithstanding a subsequent change of opinion on the part of the court, which results in the overruling of the original decision and a ruling against the validity of the bonds.[18] A policy of life insurance is also one of the forms

v. Jack, 97 Ind. 570, 49 Am. Rep. 478; Hollaman v. El Arco Mines Co., 137 App. Div. 862, 122 N. Y. Supp. 852; Metzger v. Greiner, 29 Ohio Cir. Ct. R. 447. But see Addison School Tp. v. School City of Shelbyville, 21 Ind. App. 707, 52 N. E. 105.

[14] Hollinshead v. Von Glahn, 4 Minn. 190 (Gil. 131); Geddes v. Brown, 5 Phila. (Pa.) 180.

[15] Byrum v. Henderson, 151 Ind. 102, 51 N. E. 94; Lewis v. Symmes, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428; Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193. But see Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944.

[16] Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331. But see Allen v. Allen (Cal.) 27 Pac. 30.

[17] Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395.

[18] City of Kenosha v. Lamson, 9 Wall. 477, 19 L. Ed. 725; Rich-

of contract protected by this principle, and it will be interpreted and enforced in accordance with the decisions of the courts existing at the time it was written, and with reference to which it may be supposed to have been framed, rather than according to later and contrary decisions.[18] So also a franchise which was granted under a statute supposed at the time to be valid, its constitutionality not having been questioned, and which was founded on a good consideration, will not be destroyed by a subsequent decision holding the statute invalid; to this extent and for this purpose, the new decision will not be given a retroactive operation.[20] But it is an important and necessary limitation upon this general rule that the decision upon which a party relies, and upon which his title or his contract is rested, should have been given by the court of last resort in the state. The judgment of an inferior court, even if it is not appealed, is in no sense binding on the higher court; and any one who relies on it as a basis for a contract or a title, does so at his own peril. If the court of last resort afterwards lays down a contrary rule, the inferior courts will be bound to adopt and follow it, and a party so situated cannot claim that an exception shall be made in his favor.[21]

SAME; SHOWING INDIVIDUAL RIGHTS AND INJURY

215. In order that an earlier decision should be followed and applied in a particular case, rather than a later and overruling decision, it must appear that the right or interest in suit was settled in accordance

ardson v. Marshall County, 100 Tenn. 346, 45 S. W. 440; State v. City of Bristol, 109 Tenn. 315, 70 S. W. 1031.

[19] Diehm v. Northwestern Mut. Life Ins. Co., 129 Mo. App. 256, 108 S. W. 139.

[20] State ex rel. Herman v. Oakwood St. Ry., 30 Ohio Cir. Ct. R. 632.

[21] Chicago Theological Seminary v. People ex rel. Raymond, 189 Ill. 439, 59 N. E. 977, affirmed 188 U. S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641.

with such earlier decision and in reliance thereon, and that the party has a real and meritorious claim which would be frustrated by a change of decision.

It has been emphatically stated that a court is not bound to follow an earlier and overruled decision, in a particular case, unless its refusal to do so would amount to setting a trap, into which interested parties had been induced to enter, and from which they could not escape without irreparable injury.[22] And undoubtedly it is correct to say that a party cannot claim the benefit of a decision which has been overruled, merely because it is favorable to his case, or without showing that he himself relied upon it as an authoritative statement of the law, and entered into the contract, deed, or title in question in consequence of such reliance, and that he has rights of a meritorious nature which would be destroyed or seriously impaired by a change of decision as applied to his case.[23] Such a showing is not made, for instance, where it appears that a party could not have relied on or been misled by a particular decision, since the transaction in question was completed before its promulgation,[24] or when there is nothing whatever to show the date of the conveyance which is in litigation, and therefore nothing to connect it with any particular state of the judicial decisions.[25] Again, it is necessary that the particular decision on which the party relied should have been one of such a character as to justify his shaping his contracts or transactions with reference to it. This is not the case with a decision of an inferior state court, as was shown in the preceding section. And even a ruling of the court of last resort is not to be relied on where, before the occurrence of the act or contract in question, that court

[22] Diamond Plate Glass Co. v. Knote, 38 Ind. App. 20, 77 N. E. 954.

[23] Town of Hardinsburg v. Cravens, 148 Ind. 1, 47 N. E. 153; Diamond Plate Glass Co. v. Knote, 38 Ind. App. 20, 77 N. E. 954; Thompson v. Henry, 153 Ind. 56, 54 N. E. 109; Crigler v. Shepler, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (N. S.) 500.

[24] Lovejoy v. Stewart, 23 Minn. 94.

[25] Thompson v. Henry, 153 Ind. 56, 54 N. E. 109.

has said that the decision must not be taken as conclusive of the point of law involved.[26] Further, the benefit of this principle cannot be invoked unless it is shown that the original and overruled decision, if followed, would fully sustain the claim of the party seeking its benefit, such claim being considered meritorious in law. For instance, a plaintiff cannot complain of the overruling of a former decision, upon the faith of which he resorted to mandamus as the proper remedy in his particular case, when it appears that, on the merits of the case, and even assuming the form of action to be proper, the writ should be denied to him.[27] So a municipal corporation which has wrongfully appropriated a portion of a special tax fund, in consequence of a judicial misinterpretation of the statute providing for the disposition of such fund, does not acquire any vested rights therein such as would be invaded by the overruling of the erroneous decision.[28]

There is also an instance, not infrequently occurring, in which the agreement of parties will estop them from denying that their rights or relations are governed by a particular decision, though it has been overruled. This is the case where they mutually agree to abide by the result of a test case between other parties. Thus, where persons, for the purpose of avoiding litigation, agree that their rights shall be determined according to the decision to be made in a case pending in the United States Supreme Court, which case is heard by the full court and fully considered, and the decision is made under circumstances which entitle it to confidence as a final adjudication, such persons are bound by it, notwithstanding the fact that it is afterwards overruled.[29]

[26] State ex rel. American Freehold Land Mtg. Co. of London v. Tanner, 45 Wash. 348, 88 Pac. 321.

[27] Booe v. Kenner, 105 Ky. 517, 49 S. W. 330.

[28] Center School Tp. v. State ex rel. Board of School Com'rs, 150 Ind. 168, 49 N. E. 961.

[29] Woodruff v. Woodruff, 52 N. Y. 53.

SAME; TAXATION AND EXEMPTION

216. A decision of the court of last resort, recognizing the exemption of particular property from taxation or its nonliability to taxation, will protect such property from the subsequent assessment and collection of taxes for the period during which it remained in force as the law of the state, although it is afterwards overruled, the overruling decision not being allowed in this case to retroact.

This rule is illustrated by the following case: In 1888, the Supreme Court of Ohio rendered a decision that stockholders in national banks were entitled to deduct from the valuation of their shares for purposes of taxation the amount of their indebtedness, and thereafter such deductions were allowed and made. But in 1897, the court rendered a contrary decision upon the same statutes, which was affirmed by the Supreme Court of the United States. And it was then held by the federal circuit court that while all stockholders, including those who were parties to the first decision, were subject to taxation in accordance with the later decision, after it was rendered, yet such decision would not be allowed a retrospective operation, so as to authorize the state or municipalities to collect taxes on the amount of deductions made in previous years under the former decision, while that was the law of the state.[30] But here, as in other cases proper for the application of the general rule, the decision relied on must have been given by the court of final authority. Thus, in proceedings in Illinois for the collection of taxes upon lands owned by a theological seminary, judgments were entered in the county court holding the lands exempt under the charter of the seminary. While these judgments were in force, the seminary acquired additional similar lands by gift and also by purchase, relying on the decision in its favor. But it was

[30] Mercantile Nat. Bank v. Lander (C. C.) 109 Fed. 21, affirmed in Lander v. Mercantile Nat. Bank, 118 Fed. 785, 55 C. C. A. 523.

held that the state was not prevented from taxing the lands in question under later decisions, since the doctrine of equitable estoppel, in favor of one who has relied on a judicial construction of a statute, applies only to decisions of courts of last resort, not of the inferior courts.[81] It is also necessary, as in other cases, that the party should have a real, substantial, and continuing right, to be protected by following the earlier decision rather than the later. Thus, in a decision of the Supreme Court of Mississippi, affirmed by the Supreme Court of the United States, it was held that railroad companies which have consolidated cannot claim protection from taxes accruing before the overruling of a decision which recognized their exemption from taxation, on the ground of their reliance on such decision, where the taxes sued for accrued after their consolidation, since by that act they lost their exemption, if they had any.[82]

It must be admitted, however, that the general rule above stated does not pass unchallenged. A recent decision in Kentucky, for instance, holds that, where a decision of the court to the effect that banks were not subject to county taxation has been overruled, the banks may thereafter be required to pay county taxes for the period during which that decision was in force, since it merely suspended the collection of the taxes until it was overruled.[83] It has also been held (although perhaps the point is not so perfectly clear) that the overruling of a decision on the strength of which taxes were levied and collected does not warrant a suit to recover back the payments. Thus, where, at the time assessments were made for a street improvement, the statutes under which they were laid were regarded as constitutional, and the decisions as they then existed declared such statutes constitutional, it has been

[81] Chicago Theological Seminary v. People ex rel. Raymond, 189 Ill. 439, 59 N. E. 977, affirmed, 188 U. S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641.

[82] Yazoo & M. V. R. Co. v. Adams, 77 Miss. 194, 315, 28 South. 956, affirmed 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395.

[83] Bohannon v. Bank of Shelbyville, 63 S. W. 474, 23 Ky. Law Rep. 508.

held that abutting property owners whose lots were assessed thereunder were not entitled to relief on the ground that the statutes, since the assessments were made, had been adjudged unconstitutional by the supreme court of the state.[84]

EFFECT ON EXISTING JUDGMENTS

217. A judgment which is final or not appealed from is a vested right, which will not be impaired by the subsequent overruling of the decision in accordance with which it was rendered; but if an appeal from the judgment is pending, it will be decided in accordance with the latest decision of the court of final appellate jurisdiction.

When a final judgment has been rendered by a court of competent jurisdiction, the rights of the parties are fixed beyond recall, and the successful suitor has a vested right in his recovery of which he cannot lawfully be deprived either by the legislature or by the courts. If the judgment was correctly given in accordance with the law as understood at the time, having regard to the existing state of the decisions, it is not thereafter impeachable. In that case the applicable maxim is "res judicata pro veritate accipitur." If, at a later day, the court of last resort reconsiders and changes its former rulings, upon which the judgment rested, the new precedent thus set will govern the disposition of similar future cases, and may, to a limited extent, as already explained, operate retrospectively, but will neither justify nor require the setting aside or re-examination of existing judgments.[85] But a judgment is not final in this sense so long as an appeal is pending from it. This is illustrated by a case in the courts of the District of Columbia, in which a judgment was rendered by the Supreme

[84] Price v. City of Toledo, 25 Ohio Cir. Ct. R. 617.

[85] Miller v. Tyler, 58 N. Y. 477; Harburg v. Arnold, 87 Mo. App. 326.

Court (the court of first instance) in accordance with and based on a decision of the Court of Appeals in another and analogous case. From this judgment an appeal was taken to the Court of Appeals, and while this appeal was pending the decision of the Court of Appeals in the earlier case was reversed by the Supreme Court of the United States. Thereupon it was held that the judgment appealed from must be reversed, because the authority of the decision on which it rested had been destroyed, and the rule laid down by the court of last resort must be followed.[86]

[86] Macfarland v. Byrnes, 19 App. D. C. 531.

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TABLE OF CASES CITED

[THE FIGURES REFER TO PAGES]

A

Abraham v. Casey, 505, 518.
Abraham v. Roseburg, 390.
Accumulator Co. v. Consolidated Electric Storage Co., 325.
Acme, The, 430.
Acton v. Blundell, 163.
Adams v. Bucklin, 89.
Adams v. Bush, 309.
Adams v. Clapp, 198.
Adams v. Field, 435.
Adams v. Franklin, 190.
Adams v. Nashville, 590.
Adams v. Yazoo & M. V. R. Co., 57, 177, 211, 230, 234.
Adams v. Young, 408.
Adams Exp. Co. v. Ohio State Auditor, 87.
Addison School Tp. v. School City of Shelbyville, 694.
Adelbert College of Western Reserve University v. Wabash R. Co., 495, 548.
Ah Thaie v. Quan Wan, 407.
Aicard v. Daly, 233.
Aicardi v. Alabama, 561.
Akers v. Jefferson County Sav. Bank, 398.
Alabama G. S. R. Co. v. Hill, 125, 408.
Aldrich v. Newburgh News Printing & Publishing Co., 276.
Alexander v. Bank of Lebanon, 398.
Alexander v. Gordon, 681.
Alexander v. Worthington, 46, 172, 177.
Alford v. State, 337.
Alger v. Anderson, 656, 657.
Allardt v. People, 229.
Alleghany Co. v. Allen, 386.
Allen v. Allen, 694.
Allen v. Danielson, 111, 212.
Allen v. Intendant & Councilmen of La Fayette, 113.
Allen v. Rundle, 422.
Allen's Estates, 94.
Allis v. Northwestern Mut. Life Ins. Co., 517.
Allison v. McCune, 29, 157.
Allison v. Thomas, 228.
Allmark v. Platte S. S. Co., 291.
Allnut v. Lancaster, 669.
Altschul v. Gittings, 591.
American Ass'n v. Williams, 660, 662.
American Ballast Log Co. v. Cotter, 324.
American Bell Tel. Co. v. Wallace Electric Tel. Co., 324.
American Fur Refining Co. v. Cimiotti Unhairing Mach. Co., 324.
American Ice Co. v. Pocono Spring Water Ice Co., 509.
American Ins. Co. v. Fisk, 347.
American Land, Mortgage & Agency Co. v. Lombard, 469.
American Mortg. Co. of Scotland v. Hopper, 184, 332.
American Mortg. Co. of Scotland v. Woodward, 80.
American Nat. Bank v. Fountain, 50.
American Paper Pail & Box Co. v. National Folding Box & Paper Co., 327, 328.
American Steamboat Co. v. Chace, 674.
American Sugar Refining Co. v. New Orleans, 562.
American Surety Co. v. San Antonio Loan & Trust Co., 177.
American Surety Co. v. Worcester Cycle Mfg. Co., 526.
Amey v. Allegheny City, 558.
Amis v. Smith, 666.
Amory v. Lawrence, 584.
Amoskeag Mfg. Co. v. Goodale, 227.
Amy v. Watertown, 672.
Ancient Order of Hibernians, Division No. 1, of Anconda v. Sparrow, 393.
Anderson v. Connecticut Mut. Life Ins. Co., 55.

[The figures refer to pages]

Anderson v. Kramer, 263, 266.
Anderson v. May, 383.
Anderson v. Pittsburg Coal Co., 63, 398.
Anderson v. Santa Anna Tp., 481.
Anderson v. Territory, 389.
Andrae Co., In re, 527.
Andrews v. Bacon, 584.
Andrews v. Durant, 429, 430.
Andrews v. National Foundry & Pipe Works, 465.
Andrews v. Wallace, 306, 310.
Angell v. Van Schaick, 382.
Angle v. Chicago, P. & S. R. Co., 311.
Anglo-American Land, Mortgage & Agency Co. v. Lombard, 531.
Angus v. Plum, 225.
Ankeney v. Hannon, 461.
Ankeny v. Clark, 478.
Anonymous, 157.
Answer of the Justices, 89.
Anthony v. Burrow, 639.
Antigo Screen Door Co., In re, 527.
Appolos v. Brady, 564.
Arkansas Southern R. Co. v. Louisiana & A. R. Co., 590.
Arkwright Mills v. Aultman & Taylor Machinery Co., 668.
Armour Packing Co. v. Lacy, 588, 589.
Armstrong v. Harshman, 263, 270.
Armstrong Cork Co. v. Merchants' Refrigerating Co., 584.
Arnold v. Christy, 75.
Arthur v. Sylvester, 155.
Ascherson v. Bethlehem Iron Co., 377.
Ashby v. White, 154.
Asher v. Bennett, 237.
Aspden v. Nixon, 523.
Atchison v. Peterson, 444.
Atchison, T. & S. F. R. Co. v. Farrow, 389.
Atchison, T. & S. F. R. Co. v. Franklin, 389.
Atchison, T. & S. F. R. Co. v. Pickens, 301.
Atlantic Coast Line R. Co. v. Beazley, 389, 394.
Atlantic Coast Line R. Co. v. Dunning, 592.
Atlantic Coast Line R. Co. v. Farmer, 649.
Atlantic Works v. Tug Glide, 346.
Atlantic & G. R. Co. v. Georgia, 454, 555, 557.
Attorney General v. Dean of Windsor, 188.
Attorney General v. Lum, 273, 295, 296.
Atwater v. A. G. Edwards Brokerage Co., 301.
Atwater v. Perkins, 417.
Atwood v. Sault Ste. Marie, 47.
Aud v. Magruder, 94, 100, 210, 416.
Aultman & Co. v. Utsey, 271.
Austen v. Miller, 628.
Austin v. Wacks, 420.
Avalon, The, 628.
Ayres v. Bensley, 77.
Ayres v. U. S., 56.

B

Backus v. Fort Street Union Depot Co., 574, 575.
Badische Anilin & Soda Fabrik v. Kalle, 451.
Bailey v. Fits Gerald, 360.
Bailey v. Magwire, 556.
Baird, In re, 333.
Baird v. Crank, 403.
Baker, In re, 586.
Baker v. Kerr, 54, 55.
Baker v. Norwood, 574.
Baker v. Watts, 270.
Baldree v. Davenport, 397.
Baldwin v. Baker, 351.
Baldwin v. Spriggs, 123.
Baldy v. Hunter, 360.
Balkam v. Woodstock Iron Co., 583.
Ball v. Anderson, 382.
Ball v. Herbert, 118.
Ballard v. Tomlinson, 142.
Ballard v. Wiltshire, 364.
Ballatine v. Yung Wing, 566.
Ballou v. United States Flour Milling Co., 305.
Baltimore Belt R. Co. v. Baltzell, 154.
Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 590.
Baltimore & O. R. Co. v. Baugh, 453, 615, 647, 648, 649.
Bancroft v. Hambly, 636.
Bane v. Wick, 265, 269.
Bank of Garrison v. Malley, 349.
Bank of Hamilton v. Dudley's Lessee, 558, 567.
Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania, 628.
Bank of Santa Fé v. Haskell County Bank, 280.
Bank of Sherman v. Apperson, 630.
Bank of United States v. Longworth, 562.
Bank of United States v. Norton, 337.

[The figures refer to pages]

Barber, In re, 103.
Barber v. Pittsburgh, Ft. W. & C. R. Co., 462.
Barber Asphalt Pav. Co. v. French, 337.
Bardon v. Land & River Imp. Co., 591.
Barefield v. State, 130.
Barker, Ex parte, 90.
Barker v. Baltimore & O. R. Co., 149.
Barker v. Jackson, 505.
Barker v. Lomax, 164.
Barnes v. Crowe, 94.
Barnes v. Lynch, 392.
Barnes v. Ontario Bank, 132.
Barney v. Oelrichs, 584.
Barnum v. Okolona, 488.
Barr v. Lake, 301.
Barr v. Poor, 295.
Barrett v. Holmes, 584.
Barrette v. Whitney, 345.
Barringer v. Fisher, 351.
Barry, In re, 536.
Bartholomew v. Austin, 485.
Bates v. Relyea, 4, 13, 185, 232.
Bauserman v. Blunt, 459, 539, 564, 583, 584.
Baxter & Co., In re, 529.
Beach v. Hobbs, 327, 333.
Beach v. Viles, 561.
Beamish v. Beamish, 27, 80, 188.
Bean v. Bird, 302.
Beard v. Independent Dist. of Pella City, 658.
Beardsley v. Hartford, 148.
Beatty v. Wilson, 662.
Beauchamp, In re, 587.
Beauregard v. New Orleans, 504.
Beck v. Brady, 231.
Becker v. Baltimore & O. R. Co., 649.
Becker v. Schutte, 302.
Becker v. Superior Court of Santa Clara County, 253.
Beebe v. Louisville, N. O. & T. R. Co., 660.
Beede, In re, 527.
Beekman Lumber Co. v. Acme Harvester Co., 342.
Belcher v. Chambers, 337.
Belding v. Hebard, 505.
Belfast Sav. Bank v. Stowe, 495.
Bell v. Farwell, 386.
Bell v. Morrison, 561.
Bell v. Perkins, 371.
Bemis v. Becker, 389.
Bendey v. Townsend, 516.
Bennett v. Bennett, 252, 255, 256.
Bennett v. Butterworth, 662.
Bentley v. Goodwin, 131, 306, 309.
Bergamini v. Bastian, 114, 451.
Bergman v. Bly, 562.
Berkey v. Cornell, 662.
Berkley v. Presgrave, 156.
Bernard v. Whitney Nat. Bank, 114, 451.
Bernheim v. Birnbaum, 659.
Berrian v. Rogers, 562.
Berry v. Lake Erie & W. R. Co., 641.
Berry v. Northwestern & P. Hypotheck Bank, 579.
Besser v. Alpena Circuit Judge, 389.
Bethlehem Iron Co. v. Hoadley, 674.
Beville, Ex parte, 431.
Bibb v. Bibb, 249.
Bier v. Roebling Const. Co., 294.
Bigelow v. Nickerson, 675.
Bigelow v. Tilden, 296.
Billgery v. Land Trust of Indianapolis, 372.
Biru v. St. Mark's Church of Waterloo, 75.
Birdseye v. Rogers, 192.
Black v. Elkhorn Min. Co., 556, 584.
Black v. Lusk, 337, 351.
Blackburn v. Reilly, 443.
Blackwell v. Southern Pac. Co., 500.
Blaine v. Curtis, 381.
Blais v. Minneapolis & St. L. R. Co., 110.
Blake v. Robertson, 320.
Blaylock v. Muskogee, 389, 397, 573.
Bliss v. Callie Bros., 395.
Bloodgood v. Grasey, 41.
Bloom v. Richards, 221.
Bloomington Mut. Ben. Ass'n v. Blue, 418.
Board of Com'rs of Bayou Terre aux Bœufs Drainage Dist. v. Baker, 261.
Board of Com'rs of Franklin County, Ohio, v. Gardiner Sav. Inst., 489.
Board of Com'rs of Harrison County v. Cole, 266.
Board of Com'rs of Henderson County v. Travelers' Ins. Co., 489.
Board of Com'rs of Hertford County, N. C., v. Tome, 489, 490.
Board of Com'rs of Jackson County v. State, 228.
Board of Com'rs of Jasper County v. Allman, 209.

[The figures refer to pages]

Board of Com'rs of Morgan County v. Pritchett, 263, 266.
Board of Com'rs of Onslow County v. Tollman, 492.
Board of Com'rs of Oxford, N. C., v. Union Bank of Richmond, 462, 480.
Board of Com'rs of Stanly County v. Coler, 488.
Board of Com'rs of Tipton County v. Indianapolis, P. & C. R. Co., 265.
Board of Com'rs of Wilkes County v. Coler, 488, 553.
Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort, 481.
Board of Education of Bladen County v. Board of Com'rs, 205.
Board of Education of City of Emporia v. State, 57.
Board of Liquidation of City Debt v. Louisiana, 607.
Board of Trustees v. Cuppett, 347.
Boatmen's Bank of St. Louis, Mo., v. Fritzlen, 276, 334.
Bodley v. Gaither, 337.
Bodley v. Taylor, 505.
Bogard v. State, 227.
Bohannon v. Bank of Shelbyville, 699.
Boise City, etc., Water Co. v. Boise City, 389.
Bole v. Horton, 168.
Bolles v. Amboy, 537.
Bolles v. Brimfield, 492.
Bond v. Appleton, 383.
Bond v. Dustin, 102.
Bond v. Hopkins, 34.
Bond v. John V. Farwell Co., 537.
Bond v. Munro, 188.
Bonds-Foster Lumber Co. v. Northern Pac. R. Co., 256.
Bondurant v. Watson, 502.
Booe v. Kenner, 697.
Boon v. Bowers, 256, 261.
Boos v. Morgan, 214.
Bothwell v. Millikan, 227.
Bouldin v. Alexander, 75.
Bowen v. Crow, 395.
Bowen v. Stewart, 54.
Bowen v. Tipton, 423.
Bowers v. Smith, 394.
Bowman v. Board of Chosen Freeholders of Essex County, 183, 294.
Bowsher v. Watkins, 98.
Boyce v. St. Louis, 397, 401.
Boyce v. Tabb, 611.
Boyd v. Alabama, 47.
Boyd v. State, 690.
Boydson v. Goodrich, 44.
Boyle v. Arledge, 562, 584.
Boyle v. Zacharie, 134.
Boynton v. Chicago Mill & Lumber Co., 182.
Boyt v. Mitchell, 397.
Braden v. Graves, 266.
Brader v. Brader, 257.
Bradley v. Fallbrook Irr. Dist., 610.
Bradley v. Lill, 627.
Bradley v. Lowry, 115.
Bradshaw v. Duluth Imperial Mill Co., 100, 692.
Bragg v. Meyer, 630.
Bragg Mfg. Co. v. New York, 325.
Branch v. Macon & B. R. Co., 632.
Brashear v. West, 561.
Bratsch v. People, 43.
Braxon v. Bressler, 256.
Braynard v. Marshall, 337.
Brechbill v. Randall, 101.
Breedlove v. Turner, 7.
Breitung v. Chicago, 364, 365.
Brennan v. American Sulphur & Mining Co., 284.
Brennan v. New York, 200, 271, 272, 274.
Bressler v. Wayne County, 347.
Bridge v. Johnson, 79.
Brigham-Hopkins Co. v. Gross, 586.
Bright v. Esterly, 244.
Brill v. Washington Ry. & Electric Co., 105, 324.
Brine v. Hartford Fire Ins. Co., 515.
Brinkerhoff v. Marvin, 305.
Brinkley v. Brinkley, 408, 439.
Brinkmeier v. Missouri Pac. R. Co., 343, 351.
Brisbane v. Dacres, 106, 107.
Bristol v. Brent, 170.
British American Ins. Co. v. Joseph, 143.
Britton v. Thornton, 510.
Broadwater v. Wabash R. Co., 38, 47.
Broadway Nat. Bank v. Baker, 381.
Broderick's Will, In re, 656.
Brooklyn City & N. R. Co. v. National Bank of Republic, 627.
Brooks v. Black, 131, 423.
Brooks v. Farwell, 290.
Brooks v. Memphis, 473.
Brophy, In re, 348.
Brown, Ex parte, 90.
Brown v. Brown, 213.
Brown v. Chesapeake & O. R. Co., 416.

[The figures refer to pages]

Brown v. Chicago & N. W. R. Co., 44.
Brown v. Coon, 177.
Brown v. Eagle Creek & L. W. L. Gravel Road Co., 227.
Brown v. Farran, 245.
Brown v. Finley, 243.
Brown v. Grand Rapids Parlor Furniture Co., 580, 632.
Brown v. Grundy, 581.
Brown v. Mount Battie Mfg. Co., 278.
Brown v. New Jersey, 557.
Brown v. Pechman, 286.
Brown v. Pegram, 545.
Brown v. Phillips, 381.
Brown v. Somerville, 268.
Brown v. U. S., 74, 191.
Brown County Com'rs v. Butt, 444.
Brown-Forman Co. v. Com., 590.
Brown Mfg. Co. v. Mast, 326.
Browne v. Scofield, 444.
Bruff v. Thompson, 135.
Brunswick Terminal Co. v. National Bank of Baltimore, 485, 487, 583, 634.
Bryan v. Berry, 415.
Bryan v. Pinney, 362, 378.
Bryant v. Thompson, 291.
Bryar v. Bryar, 510.
Bryar v. Campbell, 510.
Brydges v. Duchess of Chandos, 213.
Bryson v. Gallo, 670.
Buchanan v. Knoxville & O. R. Co., 193.
Bucher v. Cheshire R. Co., 292, 497, 561, 582, 640, 644, 682.
Buchner v. Chicago, M. & N. W. R. Co., 45, 166, 175.
Budgett, In re, 231.
Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co., 571.
Buford v. Holley, 502.
Buford v. Houtz, 445.
Buford v. Kerr, 523, 579.
Buford v. Smith, 407.
Bullion & Exchange Bank v. Hegler, 584.
Bunting v. Speek, 150, 243.
Burgess v. Seligman, 453, 454, 472, 473, 478, 485, 487, 497, 565.
Burham v. Fritz, 502.
Burke, In re, 525.
Burks v. Hinton, 223.
Burnham v. Ft. Dodge Grocery Co., 349.
Burns, The, 673.
Burnside v. Wand, 391.
Burrow-Giles Lithographic Co. v. Sarony, 441.
Burrows v. Klunk, 102.
Burt v. Keyes, 603, 656.
Burt v. Powis, 310.
Burwell v. Burgess, 348.
Bury v. Young, 414.
Bushnell, Ex parte, 348.
Bussing v. Mt. Vernon, 304.
Butler v. Douglass, 656, 657.
Butler v. Fayerweather, 685.
Butte & Boston Consol. Min. Co. v. Montana Ore Purchasing Co., 390.
Butz v. Muscatine, 541, 608.
B. Vandegrift & Co. v. U. S., 321.
Byrne v. Kansas City, Ft. S. & M. R. Co., 543.
Byrum v. Henderson, 694.

C

Caesar v. Capell, 465, 485.
Cain v. Hockensmith Wheel & Car Co., 529.
Cairo, V. & C. R. Co. v. Brevoort, 634.
Calder v. Bull, 558.
Caldwell v. Armour, 364.
Caldwell v. Gale, 401.
Caledonian R. Co. v. Walker's Trustees, 27.
Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 187, 261, 595, 597, 598.
Calkins v. Long, 219.
Callanan v. Port Huron & N. W. R. Co., 181.
Callender's Adm'r v. Keystone Mut. Life Ins. Co., 100, 206, 220, 221.
Camp, In re, 587.
Campau v. Detroit Driving Club, 279.
Campbell v. American Ben. Club Fraternity, 397.
Campbell v. Claudius, 666.
Campbell v. Graham, 106.
Campbell v. Los Angeles Gold Mine Co., 230.
Campbell v. Perth Amboy Mut. Loan, Homestead & Building Ass'n, 692.
Campbell v. Quinlin, 389.
Canada, The, 664.
Canadian Bank of Commerce v. Leale, 300.
Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land Mortg. Co., 307.
Cape Girardeau & T. B. T. R. Co. v. Southern I. & M. Bridge Co., 183.

[The figures refer to pages]

Capitol Bank of St. Paul, Minn., v. School Dist. No. 26, Barnes County, N. D., 457.
Capitol Traction Co. v. Hof, 396.
Caples v. State, 147.
Carlisle v. Gibbs, 306.
Carlson v. Stuart, 390.
Carlton v. Felder, 381.
Carpenter v. Carpenter, 263.
Carpenter v. Logan, 518.
Carr v. Carr, 167.
Carr v. Eel River & E. R. Co., 127, 408.
Carrau v. O'Calligan, 659.
Carrington v. Florida R. Co., 291.
Carroll v. Burns, 104.
Carroll v. Carroll's Lessee, 174, 177, 565.
Carroll County v. Smith, 486.
Carslake v. Mapledoram, 142.
Carson v. Southern R. Co., 311.
Carstairs v. Cochran, 175, 557.
Carter v. Barton, 397.
Carter v. State, 154.
Cartwright v. Bamberger, 407.
Carver v. Louthain, 246.
Case v. Kelly, 505.
Cass County v. Johnston, 558.
Cass County v. Security Imp. Co., 390.
Casserleigh v. Wood, 638.
Castle v. Madison, 280, 289.
Castro v. De Uriarte, 670.
Cathcart v. Robinson, 429, 434.
Catherwood v. Gapete, 671.
Cawley v. La Crosse City R. Co., 196.
Caywood v. Supreme Lodge Knights & Ladies of Honor, 300.
Celluloid Mfg. Co. v. Zylonite Brush & Comb Co., 320.
Center School Tp. v. State, 689, 693, 697.
Central of Georgia R. Co. v. Waldo, 282.
Central Trust Co. v. Citizens' St. R. Co. of Indianapolis, 485, 550, 595.
Central Trust Co. v. East Tennessee, V. & G. R. Co., 593.
Central Trust Co. v. Wabash St. L. & P. R. Co., 286.
Central Trust Co. of New York v. United States Flour Milling Co., 276, 334.
Chamberlain v. Mensing, 672.
Chandler v. St. Louis & S. F. R. Co., 379, 646, 649.
Chapman v. Gray, 440.
Chapman v. Western Union Tel. Co., 405.
Charles v. Arthur, 227, 308.
Charnley v. Sibley, 550, 570.
Chase v. Superior, 217.
Chaudron & Peyton, In re, 508.
Cheatham v. Evans, 550, 583.
Cheely v. Clayton, 536.
Chelmsford, The, 320.
Chemung Canal Bank v. Lowery, 585, 671.
Chesapeake & O. R. Co. v. Kentucky, 583.
Chesapeake & O. R. Co. v. Pew, 390.
Chesapeake & W. R. Co. v. Washington, C. & St. L. R. Co., 135.
Chesley v. Nantasket Beach Steamboat Co., 351.
Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa, 175, 477, 497.
Chicago, B. & Q. R. Co. v. Smyth, 555.
Chicago Great Western R. Co. v. Price, 642.
Chicago, K. & N. R. Co. v. Van Cleave, 109, 131.
Chicago, M. & St. P. R. Co. v. Ross, 406, 407.
Chicago, R. I. & P. R. Co. v. Groves, 409.
Chicago Theological Seminary v. People, 695, 699.
Chicago & A. R. Co. v. Walters, 347.
Chicago & A. R. Co. v. Wiggins Ferry Co., 385.
Chicago & Joliet Electric R. Co. v. Freeman, 300.
Chicago & N. W. R. Co. v. Kendall, 677.
Chicago & N. W. R. Co. v. Whitton, 674, 676.
Childs v. Ferguson, 523.
Chillicothe & B. R. Co. v. Brunswick, 390.
Chisholm v. Caines, 481, 506, 634.
Chisholm v. Weisse, 390.
Choate v. Spencer, 378.
Christy v. Pridgeon, 459, 540, 564.
Churchman v. Ireland, 109.
Churchman v. Martin, 337.
Chusan, The, 663.
Chuse Engine & Mfg. Co. v. Vromania Apartment Co., 301.
Cincinnati Gaslight & Coke Co. v. Bowman, 295.
Citizens' Nat. Bank v. Brown, 101, 431.
Citizens' Sav. Bank v. Newburyport, 629.
Citizens' Sav. Bank v. Owensboro, 607.

[The figures refer to pages]

City Council of Anderson v. Fowler, 229.
City of Baltimore v. Allegany County Com'rs, 171.
City of Baltimore v. Baltimore & O. R. Co., 356, 366.
City of Baltimore v. Williams, 433.
City of Beatrice v. Edminson, 463, 539.
City of Chicago v. Baker, 682.
City of Chicago v. Robbins, 502, 611, 632.
City of Cincinnati v. Taft, 219, 253.
City of Davenport v. Lord, 666.
City of Defiance v. McGonigale, 533.
City of Denver v. Porter, 534.
City of Detroit v. Detroit City R. Co., 473.
City of Detroit v. Osborne, 535, 641.
City of Dubuque v. Illinois Cent. R. Co., 136.
City of El Paso v. Ft. Dearborn Nat. Bank, 368.
City of Florence v. Berry, 80.
City of Hastings v. Foxworthy, 263, 266.
City of Indianapolis v. Navin, 367.
City of Kalamazoo v. Crawford, 79.
City of Kenosha v. Lamson, 694.
City of Laporte v. Gamewell Fire Alarm Tel. Co., 389.
City of Logansport v. La Rose, 43.
City of Mankato v. Barber Asphalt Pav. Co., 637.
City of New Orleans v. Hermann, 227.
City of New Orleans v. Poutz, 231.
City of New York, In re, 307.
City of Ottumwa, Iowa, v. City Water Supply Co., 542, 636.
City of Paterson v. East Jersey Water Co., 356.
City of Philadelphia v. Martin, 104.
City of Richmond v. Smith, 561.
City of St. Charles v. Stookey, 669.
City of Seattle, In re, 223, 390.
City of Sedalia v. Donohue, 303.
City of Sedalia v. Gold, 245.
City of Sioux Falls v. Farmers' Loan & Trust Co., 469, 542, 573.
City of Tyler v. St. Louis Southwestern R. Co., 390.
City of Wahoo v. Nethaway, 211.
City Water Supply Co. v. Ottumwa, 495.
City & County of San Francisco v. Spring Valley Waterworks, 211.
Claflin v. Lisso, 509.
Claflin v. Wilcox, 63, 98.
Claiborne County v. Brooks, 533.
Clapp v. Otoe County, Neb., 489.
Clarendon Land, Investment & Agency Co. v. McClelland, 445.
Clark v. Atlantic City, 534.
Clark v. Bever, 611, 676.
Clark v. Jeffersonville, M. & I. R. Co., 389.
Clark v. Knowles, 383.
Clark v. Russell, 558.
Clark v. Thomas, 46, 175.
Clark v. Troy, 240.
Clark v. Turner, 397.
Clark v. Wells, 671.
Clark v. Wolf, 352.
Clarke v. Clarke, 497.
Clarke v. Figgins, 410.
Clarke v. Western Assur. Co., 130, 410.
Clarksburg Electric Light Co. v. Clarksburg, 542.
Clary v. Hoagland, 279.
Cleaver v. Traders' Ins. Co., 290, 292, 293.
Clements v. Berry, 604.
Cleveland, C., C. & St. L. R. Co. v. Schneider, 304.
Cleveland, P. & A. R. Co. v. Franklin Canal Co., 531.
Clews v. Mumford, 347.
Clinger's Adm'x v. Chesapeake & O. R. Co., 351.
Coad v. Cowhick, 394.
Coates v. Muse, 474.
Coats v. Chicago, R. I. & P. R. Co., 383.
Coburn v. Cedar Valley Land & Cattle Co., 291.
Cochran v. Darcy, 351.
Coffey v. Gamble, 57.
Cohens v. Virginia, 49, 52, 177.
Cohoon v. Fisher, 182.
Cole v. People, 394.
Cole v. Wright, 266.
Cole Silver-Min. Co. v. Virginia & Gold Hill Water Co., 276, 334.
Colegrove v. Smith, 101.
Coleman v. Peshtigo Lumber Co., 591.
Coler v. Board of Com'rs of Stanly County, 489, 491.
Collie v. Franklin County Com'rs, 226.
Colorado Seminary v. Board of Com'rs of Arapahoe County, 253.
Coltrane v. Blake, 543.
Columbia Ave. Savings Fund Safe Deposit, Title & Trust Co. v. Dawson, 504.
Columbian Correspondence College v. Wynne, 197.
Combs v. Combs, 116.
Commercial Nat. Bank v. Chambers, 590.

[The figures refer to pages]

Commissioners of Inland Revenue v. Harrison, 232.
Commissioners of Leavenworth County v. Miller, 396.
Com. v. Anthes, 142.
Com. v. Atlantic Coast Line R. Co., 358.
Com. v. Covington & C. Bridge Co., 345.
Com. v. Davis, 47.
Com. v. Geesey, 295.
Com. v. Hess, 158.
Com. v. Huntley, 356.
Com. v. International Harvester Co. of America, 562, 563.
Com. v. Lewis, 338.
Com. v. Louisville Gas Co., 233.
Com. v. Louisville Property Co. 171.
Com. v. McHale, 158.
Com. v. Mill Creek Coal Co., 226.
Com. v. Miller, 73, 235.
Com. v. Monongahela Nav. Co., 298.
Com. v. Morrison, 347.
Com. v. National Oil Co., 226.
Com. v. Paine, 167.
Com. v. People's Exp. Co., 348.
Com. v. Randolph, 159.
Com. v. Walsh, 209.
Com. v. Wardwell, 115.
Compton v. Collinson, 106.
Cone v. Ivinson, 131.
Conley, Ex parte, 100.
Connecticut Mut. Life Ins. Co. v. Bear, 155.
Connecticut Mut. Life Ins. Co. v. Cushman, 517.
Connecticut Mut. Life Ins. Co. v. Union Trust Co., 682, 686.
Connecticut River Power Co. v. Dickinson, 281.
Conners v. Burlington, C. R. & N. R. Co., 121.
Consolidated Rendering Co v. Vermont, 572.
Consolidated Roller-Mill Co. v. George T. Smith Middlings Purifier Co., 326.
Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York, 288.
Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., 597.
Consumers' Gas Trust Co. v. Quinby, 571.
Continental Ins. Co. v. Jachnichen, 414.
Continental Life Ins. Co. v. Houser, 266.
Continental Nat. Bank v. Heilman, 684.
Continental Securities Co. v. Interborough Rapid Transit Co., 333, 470, 471, 627.
Converse, In re, 567.
Converse v. Ayer, 382.
Converse v. Mears, 539, 611, 634.
Conway v. Taylor's Ex'r, 503.
Cook v. Foley, 662.
Cook v. Rogers, 232.
Cook's Estate, In re, 266.
Coolidge v. Curtis, 562.
Copenhaver, In re, 489.
Copper Queen Consol. Min. Co. v. Territorial Board of Equalization, 393, 436.
Corbett v. Poelnitz, 157.
Corder v. Morgan, 140.
Corn Exch. Bank v. Peabody, 177.
Cornell University v. Fiske, 539, 561.
Corrigan v. Chicago, 418.
Cosgrove v. Wayne Circuit Judge, 48.
Costello v. Muheim, 389.
Costello v. Syracuse, B. & N. Y. R. Co., 295, 297.
Cotton v. Brien, 384.
Coulson v. Coulson, 253.
Coulter v. Phœnix Brick & Construction Co., 183.
Coulter v. Stafford, 389.
Coveney v. Conlin, 398.
Cowper v. Cowper, 34, 35.
Cox v. Crumley, 183.
Craig v. Bennett, 54, 57.
Craig v. Brown, 680.
Crane v. Bennett, 50.
Crigler v. Shepler, 696.
Crippen v. Laighton, 401.
Crispe v. Perritt, 154, 164.
Croan v. Phelps' Adm'r, 214.
Crocker v. Scott, 366.
Crockett v. St. Louis & H. R. Co, 301.
Crohn v. Clay County State Bank, 177.
Crooker v. Pearson, 381.
Crooks v. Allan, 126.
Crooks v. Stuart, 311, 313, 562.
Crosby v. Lehigh Val. R. Co., 593.
Cross v. Allen, 469, 546.
Cross v. Burke, 173.
Crowe, Ex parte, 142.
Crowther v. Fidelity Ins., Trust & Safe-Deposit Co., 555.
Cucullu v. Louisiana Ins. Co., 381.
Cuddeback, Matter of, 87.
Cullen v. Cullen, 269.
Cullinan, In re, 276.
Cumberland Building & Loan Ass'n v. Sparks, 514, 519.

[The figures refer to pages]

Cunningham v. Evansville & T. H. R. Co., 414.
Cunningham v. Krutz, 350.
Curdy v. Berton, 127.
Curran v. Witter, 423.
Curriden v. St. Paul & N. P. R. Co., 256.
Currie v. Lewiston, 473.
Curtis, In re, 598.
Curtis v. Cleveland, C., C. & St. L. R. Co., 640.
Curtis v. Overman Wheel Co., 327.
Curtis v. Smith, 666.
Cushing v. Richardson, 301.
Cutter Electrical & Manufacturing Co. v. Anchor Electric Co., 324.

D

Daily v. Swope, 396.
Dallas County v. Merrill, 373.
Dalmer v. Barnard, 106.
Daniels v. Clegg, 389.
Daniels v. State, 303.
Danville Water Co. v. Danville, 567.
Darling v. Blazek, 282.
Daugherty v. American Union Tel. Co., 126.
Davenport v. Moore, 675.
Davenport Nat. Bank v. Mittelbuscher, 541.
Davidson v. Biggs, 92, 214, 231.
Davidson v. Calkins, 662.
Davidson v. Dallas, 266.
Davidson v. New Orleans, 574.
Davie v. Briggs, 561.
Davie v. Hatcher, 630.
Davies v. Davies, 98.
Davies v. Powell, 148.
Davis v. Commonwealth Land & Lumber Co., 468.
Davis v. David, 445.
Davis v. Mason, 510, 512, 561.
Davis v. Millaudon, 177.
Davis v. Packard, 355.
Davis v. Robertson, 384.
Davis v. St. Louis & S. F. R. Co., 290.
Davis v. Sladden, 144.
Davis v. Superior Court of City & County of San Francisco, 191.
Dawson v. Coffey, 390.
Dawson v. Ogange, 282.
Day v. Munson, 233, 245.
Day v. Wallace, 421.
Dean v. Gibson, 252.
Deane v. Clayton, 156, 163.
Deans v. McLendon, 366.
Debitulla v. Lehigh & Wilkesbarre Coal Co., 544.
De Ferranti v. Lyndmark, 499.
Deglow v. Kruse, 77.
De La Beckwith v. Superior Court of Colusa County, 281.
Delaware, L. & W. R. Co. v. Central Stock-Yards & Transit Co., 66.
Delaware & H. Canal Co. v. Com., 298, 376.
Demandray v. Metcalf, 161.
Denham v. Holeman, 59.
Denney v. State, 229.
Dennick v. Central R. Co. of New Jersey, 674.
Dennison v. Christian, 351.
Dent v. U. S., 379.
Denver & R. G. R. Co. v. Warring, 381.
Derosia v. Ferland, 173.
Des Moines St. R. Co. v. Des Moines B. G. St. R. Co., 46.
Despain v. Crow, 231.
Detroit Lumber Co. v. The Petrel, 177.
Detroit United Ry. v. Nichols, 669.
De Vall v. De Vall, 345.
Devine's Estate, In re, 289.
Devitt v. Providence Washington Ins. Co., 377.
Dewey v. Gray, 265.
Dexter v. Arnold, 515.
Dexter v. Edmands, 532.
Dexter, Horton & Co. v. Sayward, 671.
Diamond Plate Glass Co. v. Knote, 696.
Dibble v. Bellingham Bay Land Co., 583.
Dibblee v. Furniss, 685.
Dickey v. Orr, 301.
Dickinson v. Coates, 411.
Dickson v. Dickson, 239.
Diehm v. Northwestern Mut. Life Ins. Co., 695.
Dike v. Kuhns, 480.
Dillon v. Union Pac. R. Co., 649.
Dixon v. Pluns, 202.
Dixon v. Ricketts, 394.
Dodd v. Ghiselin, 523.
Dodge v. Gaylord, 288.
Dodge v. Norlin, 526.
Dodge v. Tulleys, 516.
Dodge v. Woolsey, 339.
Doe v. Hicks, 87.
Doe v. Hutton, 110.
Doe v. Meyler, 111.
Doll v. Equitable Life Assur. Soc. of United States, 686.
Donnell v. Columbia Ins. Co., 627.
Donner v. Palmer, 43, 85.
Dooley v. Pease, 500, 501.
Doolittle v. Shelton, 191.
Dormidy v. Sharon Boiler Works, 593.

[The figures refer to pages]

Dotson v. Kirk, 570.
Douglass v. Pike County, 477, 486, 488.
Dowling v. Salliotte, 130.
Downes v. Bidwell, 136.
Dozier Lumber Co. v. Smith-Isburg Lumber Co., 281.
Draper v. Emerson, 390.
Drennan v. People, 389.
Drew v. Collins, 117, 307.
Driggs v. Rockwell, 190.
Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 412.
Dubois v. McLean, 558.
Dubuch v. Goudchaux, 414.
Duff v. Fisher, 92.
Duff Mfg. Co. v. Norton, 327.
Dugan v. Beckett, 527.
Dugan v. Campbell, 256.
Dugan v. Fowler, 270.
Dugan v. Hollins, 196.
Duke of Cumberland v. Codrington, 433, 438.
Duncan v. Gegan, 290.
Duncomb v. New York, H. & N. R. Co., 350.
Dundee Mortgage Trust Inv. Co. v. School Dist. No. 1, Multnomah County, 596.
Dunham, In re, 693.
Dunham v. Hastings Pav. Co., 377.
Dunklin County v. Chouteau, 250.
Dunn v. Games, 666.
Du Pont, In re, 42.
Dupree v. Mausur, 585.
Durham v. Linderman, 395.
Duval v. Hunt, 389.
D'Wolf v. Rabaud, 561.
Dyer v. Smith, 382.
Dygert v. Vermont Loan & Trust Co., 654.

E

Earnshaw v. Western Stone Co., 300.
Eason v. Garrison & Kelly, 528.
East Central Eureka Min. Co. v. Central Eureka Min. Co., 508.
Eastern Building & Loan Ass'n v. Bedford, 638.
East Oakland Tp. v. Skinner, 468.
Easton v. Houston & T. C. R. Co., 641.
Eaton v. Jaques, 159.
Eaton v. St. Louis Shakspear Mining & Smelting Co., 569.
Eau Claire Nat. Bank v. Benson, 231, 381, 382.
Eckerson v. Archer, 58.
Edgarton v. Furst & Bradley Mfg. Co., 322.
Edgerton v. New York, 641.
Edison Electric Light Co. v. Bloomingdale, 330.
Edison Electric Light Co. v. Packard Electric Co., 324.
Edison Electric Light Co. v. Philadelphia Trust, etc., Co., 324.
Edmunds v. Povey, 34.
Edwards v. Davenport, 495, 505.
Edwards' Adm'r v. Lam, 106.
Eells v. St. Louis, K. & N. W. R. Co., 645.
Effinger v. Kenney, 131.
Egan v. Chicago Great Western R. Co., 669.
Egan v. Chicago, M. & St. P. R. Co., 599.
Einstein v. Raritan Woolen Mills, 344.
Elder v. McClaskey, 584.
Elfring v. New Birdsall Co., 87.
Elias v. Territory, 392.
Elin, The, 116.
Ellenbogen v. Hantman, 304.
Elletson, In re, 514.
Elliott v. Felton, 593, 649.
Elliott v. Shuler, 675.
Ellison v. Georgia R. Co., 201.
Ellsworth v. Hall, 177.
Elmendorf v. Taylor, 561.
Elmwood Tp. v. Marcy, 533.
Emerson v. Atwater, 256.
E. M. Newton & Co., In re, 525.
Emory v. Owings, 268.
Ennis Waterworks v. Ennis, 301.
Enright v. Amsden, 305.
Ensworth v. National Life Ass'n, 289.
Enterprise Mfg. Co. v. Deisler, 324.
Enton v. Coney Island & B. R. Co., 50.
Equitable Life Assur. Soc. v. Brown, 570.
Erie R. Co. v. Russell, 320.
Erwin v. U. S., 679, 687.
Estill County v. Embry, 558.
Etheridge v. Sperry, 526.
Etting v. Bank of United States, 78.
Ettor v. Tacoma, 260.
Eubank v. Poston, 337.
Evans v. Moore, 60.
Evans v. Nellis, 675.
Evans v. Pittsburgh, 562.
Evants v. Strode's Adm'r, 422, 423.
Everding v. McGinn, 390.
Evey v. Mexican Cent. R. Co., 23, 449, 453, 652.

F

Fairfield v. Gallatin County, 573.
Fairfield v. Lawson, 407.

[The figures refer to pages]

Fairfield Floral Co. v. Bradbury, 333.
Falconer v. Simmons, 694.
Fall v. Hazelrigg, 389.
Fallbrook Irr. Dist. v. Bradley, 557, 559.
Faris v. State, 147, 422.
Farmers' Heirs v. Fletcher, 233, 256.
Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co., 291.
Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co., 318.
Farmers' Loan & Trust Co. v. Sioux Falls, 609.
Farmers' Nat. Bank v. Sutton Mfg. Co., 628.
Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 142.
Farr v. Newman, 36.
Farrar v. St. Louis & S. F. R. Co., 647.
Farrior v. New England Mortg. Security Co., 693.
Farwell Case, 185.
Farwell v. Boston & W. R. Corp., 406.
Farwell v. Laird, 55.
Faulkner v. Hart, 397, 398.
Fayerweather Will Cases, The, 330.
F. B. Vandegrift Co. v. U. S., 321.
Feamster v. Feamster, 59.
Federal Lead Co. v. Swyers, 469.
Feige v. Michigan Cent. R. Co., 132.
Fentum v. Pocock, 118.
Ferrell v. Madigan, 349.
Ferris v. Coover, 341, 353.
Feusier v. Lammon, 352.
Fidelity Insurance, Trust & Safe Deposit Co., Appeal of, 435.
Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Iron Co., 558.
Fidelity Trust & Safety Vault Co. v. Louisville, 62.
Fidelity & Deposit Co. v. U. S., 126.
Fidelity & Deposit Co. of Maryland v. Nisbet, 182, 197.
Field, In re, 208.
Field v. People, 294.
Field's Heirs v. Goldsby, 256.
Fielden v. Illinois, 667.
Finlayson v. Finlayson, 34.
Finley v. Babb, 288.
Finney v. Guy, 386.
Firebrass v. Pennant, 161.
First Constitutional Presbyterian Church v. Congregational Soc., 75.
First Nat. Bank, In re, 527.
First Nat. Bank v. American Nat. Bank, 350.
First Nat. Bank v. Andrews, 350.
First Nat. Bank v. Arlington, 573.
First Nat. Bank v. Chapman, 347.
First Nat. Bank v. Estherville, 365.
First Nat. Bank v. Glass, 587.
First Nat. Bank v. Lock-Stitch Fence Co., 629.
First Nat. Bank v. Mitchell, 525.
First Nat. Bank v. Turner, 347.
First Nat. Bank v. Union Trust Co., 177.
Fish v. Hemple, 397.
Fish v. Smith, 381.
Fisher v. Deering, 389.
Fisher v. Haldeman, 507.
Fisher v. Horicon Iron & Mfg. Co., 228, 249.
Fisher v. Lott, 243.
Fisher v. Wagner, 256.
Fisk, In re, 682.
Fitzgerald v. Missouri Pac. R. Co., 531.
Flagg v. Mann, 656.
Flanigan v. Sierra County, 560, 589, 590.
Flaucher v. Camden, 304.
Fleischmann v. Starkey, 450.
Fleitas v. Cockrem, 574.
Flint v. Chaloupka, 57.
Florida Cent. & P. R. Co. v. Mooney, 394.
Florida Cent. & P. R. Co. v. Schutte, 166, 172, 175, 176.
F. M. Davis Iron Works Co. v. White, 394.
Follman v. Mankato, 446.
Folsom v. Board of Trustees of Ohio State University, 398.
Folsom v. Township of Ninety-Six, 488, 573.
Fonereau v. Fonereau, 142.
Foote v. Johnson County, 493.
Foote v. Linck, 477.
Force v. Standard Silk Co., 639.
Ford v. Babcock, 307.
Forepaugh v. Delaware, L. & W. R. Co., 371, 397, 399, 623.
Forest Products Co. v. Russell, 485.
Forgerson v. Smith, 285.
Forrest v. Safety Banking & Trust Co., 628.
Forrester v. Kearney Nat. Bank, 390.
Forshaw v. Layman, 570.
Forster v. Hale, 83.
Forsyth v. Hammond, 477, 567.
Fortunato v. New York, 263.

[The figures refer to pages]

Ft. Wayne Iron & Steel Co. v. Parsell, 401.
Ft. Worth & D. C. R. Co. v. State, 302.
Foss v. Johnstone, 337.
Foster v. Elk Fork Oil & Gas Co., 508.
Fouts v. State, 48.
Fowler v. Hecker, 680.
Fowler v. Lamson, 381.
Fowles v. Bentley, 301.
Foxcroft v. Mallett, 636.
Francis v. Francis, 507.
Francisco v. Chicago & A. R. Co., 669.
Frank v. Evansville & I. R. Co., 241.
Franklin v. Kelley, 360, 366.
Franklin v. Twogood, 401.
Fred Miller Brewing Co. v. Capital Ins. Co., 381.
Freeman v. Weeks, 297.
Freeport Water Co. v. Freeport, 567.
Freese v. Tripp, 389.
Freezer v. Sweeney, 75.
French v. Camden, 305.
Fretts v. Shriver, 525.
Freund v. Yaegerman, 470.
Frick v. Clements, 668.
Fry v. Porter, 32, 33.
Fulco v. Schuylkill Stone Co., 568.
Fuller v. Hamilton County, 457.
Fuller v. Shedd, 362.
Fullerton v. Bank of United States, 561.
Fulton County Gas & Electric Co. v. Hudson River Tel. Co., 281.

G

Gabriel v. St. Louis, I. M. & S. R. Co., 398.
Gage v. Busse, 39, 57.
Gage v. Charleston, 256.
Gage v. Parker, 288.
Gage v. Smith, 394.
Galpin v. Page, 456, 631, 673.
Games v. Stiles, 588.
Gardner v. Collins, 561, 565.
Gardner v. Michigan Cent. R. Co., 647.
Garland v. Jekyll, 96, 103.
Garland v. Rowan, 92, 206.
Garmire v. State, 123.
Garrett v. Weinberg, 54.
Garth v. Arnold, 240.
Gassman v. Jarvis, 667.
Gaston v. Hayden, 301.
Gatewood v. North Carolina, 539, 552.
Gauthreaux v. Theriot, 237.
Gay v. Hudson River Electric Power Co., 548.
Geddes v. Brown, 694.
Gee v. Pritchard, 214, 216.
Gelpcke v. Dubuque, 481, 482, 488, 490, 550.
Genesee Chief v. Fitzhugh, 444.
Gentry v. Bearss, 390.
Geoghegan v. Atlas S. S. Co., 382.
George A. Shaw & Co. v. Cleveland, C., C. & St. L. R. Co., 553.
George T. Smith Middlings Purifier Co. v. McGroarty, 675.
Georgia v. Stanton, 73.
Georgia, F. & A. R. Co. v. Sasser, 382.
Georgia Pac. R. Co. v. Underwood, 418.
Gerard v. Ives, 281.
German Ins. Co. v. Manning, 96, 466.
German Nat. Bank v. Burns, 120, 412.
German Protestant Orphan Asylum v. Barber Asphalt Pav. Co., 198.
German Sav. Bank v. Franklin County, 548.
Germania Life Ins. Co. v. Ross-Lewin, 392.
Gibbons v. Ogden, 183.
Giblin v. Jordan, 212.
Gibson v. Atlantic Coast Line R. Co., 351.
Gibson v. Chouteau, 179.
Gibson v. Lyon, 667.
Gibson v. People, 298.
Gilbert v. American Surety Co., 636, 637.
Gilbert v. Moose's Adm'rs, 363.
Gilbert v. State, 132.
Gilchrist v. Little Rock, 473.
Gill v. Austin, 320.
Gill v. Parker, 227.
Gillespie v. Pocahontas Coal & Coke Co., 505, 579.
Gilligan, In re, 471.
Gillis v. Western Union Tel. Co., 103.
Gilman v. Matthews, 389.
Gilman v. Williams, 511.
Gilmore v. Sapp, 351.
Gitchell v. People, 422.
Glenn v. Garth, 385.
Glenn v. Howard, 108, 432.
Gloucester Ins. Co. v. Younger, 627.
Glover's Guardian v. Common School Dist., 301.
Goble v. Simeral, 390.
Goff v. Hathaway, 277, 289.

Golden v. Prince, 453.
Goldman v. Sotelo, 389.
Goldsborough v. U. S., 74.
Goodell v. Jackson, 256, 257.
Goodling v. Oliver, 453.
Goodman v. Jamieson, 141.
Goodnow v. Wells, 367.
Goodrich v. Chicago, 573.
Goodright v. Rich, 118.
Goodtitle v. Alker, 142.
Goodwin v. Fox, 684.
Goodyear v. Providence Rubber Co., 320.
Goodyear Dental Vulcanite Co. v. Brightwell, MacArthur & M., 312.
Goodyear Dental Vulcanite Co. v. Willis, 320.
Gordon v. Ware Nat. Bank, 637.
Gore v. Clarke, 115.
Gorton v. Falkner, 109.
Gould v. Hudson River R. Co., 404.
Gowling v. Thompson, 442.
Grandjean v. Beyl, 256.
Grand Trunk R. Co. v. Central Vt. R. Co., 322.
Grant v. Cananea Consol. Copper Co., 298, 375.
Grant v. Henry Clay Coal Co., 397.
Grant County v. Lake County, 208.
Grassmeyer v. Beeson, 263.
Gravenberg v. Laws, 662.
Graver v. Faurot, 315.
Graves v. Johnson, 398.
Graves v. State, 215.
Gray v. Eleazer, 118.
Gray v. Gray, 182.
Gray v. Havemeyer, 516.
Gray's Estate, In re, 189, 214.
Gray's Lessee v. Askew, 392.
Great Southern Fire Proof Hotel Co. v. Jones, 485, 609.
Great Western Tel. Co. v. Purdy, 584.
Green v. Com., 89.
Green v. French, 325.
Green v. Neal, 479, 561, 565.
Greenbaum v. Stein, 308.
Greencastle Southern Turnpike Co. v. State, 247.
Greiner v. Klein, 389.
Gresbeck v. Golden, 221.
Griel's Estate, 79.
Griffin v. His Creditors, 206.
Griffin v. Tucker, 302.
Griffing v. Gibb, 562.
Griffith v. Ventress, 103.
Griffiths, Ex parte, 59.
Griffiths v. Montandon, 394.
Grimes v. Bryne, 50.
Grissler, In re, 577.
Groesbeck v. Golden, 93, 221.
Grossman Bros. & Rosenbaum v. Atlas Const. Co., 280.
Grossmeyer, In re, 73.
Grubbs v. State, 190.
Guaranty Trust Co. of New York v. Galveston City R. Co., 562, 604.
Guardian Fire & Life Assur. Co. v. Thompson, 417.
Guianios v. De Camp Coal Min. Co., 358.
Guidet v. New York, 263.
Gulf & C. R. Co. v. Fuqua & Horton, 187.
Gunter v. Atlantic Coast Line R. Co., 314.
Gut v. Minnesota, 558.
Gutierrez v. El Paso & N. E. R. Co., 343, 351.

H

Hackney v. Welsh, 115, 120, 412.
Hadden v. Natchaug Silk Co., 276, 277, 334.
Hadley v. Baxendale, 68.
Hager v. American Nat. Bank, 485, 539, 588.
Hagerty v. Powers, 154.
Haggart v. Wilczinski, 505.
Halbouer v. Cuenin, 50.
Hale v. Hale, 446.
Hale v. Hilliker, 333.
Hale v. Lawrence, 381.
Hale v. Tyler, 656.
Haley Live-Stock Co. v. Board of Com'rs of Routt County, 592.
Hall v. De Cuir, 563.
Hall v. Hall, 350.
Hall v. Madison, 230.
Hallett's Estate, In re, 35, 117.
Hallinger v. Davis, 470.
Hallissy v. West Chicago Park Com'rs, 197.
Halsey v. Superior Court of City and County of San Francisco, 96.
Hambough v. Carney, 305.
Hamill v. Samuels, 50.
Hamilton v. Aurora & Marine Ins. Co., 302.
Hamilton v. David C. Beggs Co., 528.
Hamilton v. Hannibal & St. J. R. Co., 381.
Hamilton v. Loeb, 472.
Hamilton v. Smith, 347.
Hammerschlag v. Garrett, 326.
Hammond v. Anderson, 231.
Hammond v. Ridgely's Lessee, 191.
Hancock v. Louisville & N. R. Co., 531.

[The figures refer to pages]

Hancock Inspirator Co. v. Regester, 324.
Hand v. Stapleton, 207.
Hand v. Taylor, 54.
Hanford v. Artcher, 294.
Hanger v. Abbott, 652.
Hanifen v. Armitage, 79.
Hankin v. Squires, 677.
Hanley v. U. S., 678, 688.
Hannaman v. Karrick, 443.
Hanson v. Johnson, 199.
Harburg v. Arnold, 700.
Hardenburgh v. Crary, 306.
Hardigree v. Mitchum, 202.
Harding v. Guice, 661.
Harding, Whitman & Co. v. York Knitting Mills, 682.
Harkness v. Russell & Co., 419.
Harpending v. Reformed Protestant Dutch Church, 561, 583.
Harper v. Charlesworth, 94.
Harral v. Harral, 449.
Harrell v. Beall, 56.
Harrill v. Davis, 389.
Harris v. Clark, 85, 415.
Harris v. Jex, 347, 692.
Harrison v. Hoyle, 75.
Harrison v. Remington Paper Co., 539.
Harrison v. Sager, 389.
Harrow v. Myers, 242, 256, 258.
Hart v. Atlanta Terminal Co., 188.
Hart v. Chemical Nat. Bank, 43.
Hart v. Floyd, 228.
Hart v. Stribling, 166, 167, 168.
Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 500, 624, 645, 651.
Haseltine v. Central Nat. Bank, 347, 351.
Haskett v. Maxey, 184, 217, 243.
Hastings v. Crunckleton, 445.
Hastings & D. R. Co. v. Whitney, 74.
Hatch Storage Battery Co. v. Electric Storage Battery Co., 333.
Haven v. Haven, 400.
Hawes v. Contra Costa Water Co., 47, 562.
Hawkins v. Hawkins, 440.
Hawkinson v. Oatway, 214.
Hawks v. Locke, 150.
Hawley v. James, 305.
Hawley v. Smith, 269.
Hay v. Alexandria & W. R. Co., 519, 580.
Hayes v. Dayton, 320.
Hayes v. Westcott, 427.
Hayward v. Sencenbaugh, 381.
Hazard v. Chicago, B. & Q. R. Co., 293.
Hazard v. Vermont & C. R. Co., 502.
Head v. Smith, 307.
Headnotes, In re, 59.
Heaton-Peninsular Button-Fastener Co. v. Elliott-Button-Fastener Co., 326.
Heaven v. Pender, 70.
Heckathorn, In re, 525.
Heckendorn v. U. S., 321.
Hedding v. Gallagher, 282.
Hedgecock v. Davis, 73.
Heffron v. Concordia Fire Ins. Co., 300.
Heidelback, Ex parte, 629.
Heidt v. Minor, 283, 285.
Hein v. Westinghouse Air Brake Co., 669.
Heinlen v. Martin, 266.
Heinz v. Lutz, 119.
Hemenway v. Hemenway, 437.
Hemingway v. Illinois Cent. R. Co., 642.
Hemingway v. State, 143.
Hempstead v. Reed, 337, 339.
Henderson, In re, 47.
Henderson v. Griffin, 504, 561.
Henderson v. Phillips, 470.
Henderson v. Terminal R. Ass'n of St. Louis, 301.
Henderson's Heirs v. Rost, 271.
Hendryx v. Evans & Moore, 381.
Henning v. Eldridge, 268.
Henry, Succession of, 271, 274.
Henry v. Pittsburgh Clay Mfg. Co., 511.
Henry v. Quackenbush, 286.
Henry v. Ricketts, 77.
Henry E. Frankenberg Co. v. U. S., 322.
Henry F. Mitchell Co. v. Matthues, 547, 549.
Hercules, The, 180.
Herrera v. Chaves, 378.
Herron v. Whiteley Malleable Castings Co., 6, 254, 257.
Hersey v. Fosdick, 92.
Hertz v. Woodman, 78, 204.
Hess v. Reynolds, 676.
Heydock v. Stanhope, 562.
H. G. Andrae Co., In re, 527.
Hibben v. Smith, 513.
Hibbits v. Jack, 693.
Hickman v. Boffman, 432.
Hicks v. Hotchkiss, 338.
Higgins v. Bordages, 260.
Higgins Oil & Fuel Co. v. Snow, 658.
Hihn v. Courtis, 249, 256.
Hildreth v. Aldrich, 417.

Hiles v. Hanover Fire Ins. Co., 123.
Hill v. Atlantic & N. C. R. Co., 256.
Hill v. Brown, 246.
Hill v. Francklyn & Ferguson, 329, 332.
Hill v. Hite, 582.
Hill v. State, 132, 342.
Hill's Estate, In re, 49.
Hiller v. Shattuck, 510.
Hilliard v. Richardson, 429.
Hillyer v. Winsted, 264.
Hilton v. Sloan, 47.
Hinde v. Vattier, 504, 512, 561.
Hinds v. Keith, 682.
Hine v. Manhattan R. Co., 110.
Hines v. Driver, 256.
Hirth v. Graham, 126.
Hixon v. Hubbell, 390.
Hoagland v. Stewart, 58.
Hock's Will, In re, 439.
Hodgdon v. Burleigh, 588.
Hodge v. United States Steel Corp., 305.
Hodgson v. Ambrose, 253.
Hogan v. Board of Education of City of New York, 50.
Hoge v. Magnes, 505.
Holcomb v. Bonnell, 50, 52.
Hollaman v. El Arco Mines Co., 694.
Holland v. Challen, 656.
Hollingsworth v. Tensas, 635.
Hollinshead v. Von Glahn, 694.
Hollister v. U. S., 311, 313.
Hollister v. Vermont Bldg. Co., 368.
Hollman, Ex parte, 225.
Hollywood Lumber Co. v. Love, 214.
Hoosac Tunnell Dock & Elevator Co. v. O'Brien, 65.
Hoosier Mfg. Co. v. Swenson, 183.
Hope, The, 111.
Hopkins v. McCann, 132, 256.
Hoppe v. Byers, 121, 442.
Hopper-Morgan Co., In re, 611, 625.
Horner v. Amick, 54.
Hornthal v. Western Ins. Co., 363.
Horton v. Hayden, 183.
Hosack v. Weaver, 445.
Hough v. Porter, 47.
Hough v. Texas & P. R. Co., 647.
House v. Vinton Nat. Bank, 419.
House Resolutions Concerning St. Improvements, In re, 188.
Houston v. Robertson's Adm'r, 23.
Houston v. Williams, 55, 57.
Howard, In re, 197.
Howard v. Denver & R. G. R. Co., 186.
Howard v. Fleming, 566.
Howe v. Fleming, 263, 266.
Howe v. Welch, 381, 382, 383.
Howell v. Gruver, 141.
Howells Min. Co. v. Grey, 393.
Hoyt v. Gleason, 558.
Hoyt v. Thompson, 381.
H. Scherer & Co. v. Everest, 627.
H. T. Smith Co. v. Minetto-Meriden Co., 635.
Hubbird v. Goin, 505.
Hudson v. Wright, 345.
Huffman v. State, 269.
Hughes v. Cadena De Cobre Min. Co., 378.
Hughes v. Hughes, 230.
Hughes v. Pflanz, 358.
Hughey v. Sullivan, 677.
Huling v. Kaw Valley R. & Imp. Co., 574.
Hull, In re, 637.
Hull v. Carnley, 131.
Hull v. Myers, 164.
Humphreyville Copper Co. v. Sterling, 381.
Hungerford v. Cushing, 276, 334.
Hunt, In re, 147.
Hunt v. Fowler, 102, 408.
Hunt v. Hauser Malting Co., 367.
Hunt v. Hunt, 407.
Hunt v. Hurd, 649.
Hunter v. Pittsburgh, 553, 559.
Hunter v. Ruff, 276, 334.
Huntington v. Attrill, 653.
Huntress v. Place, 442.
Hurt v. Hollingsworth, 656.
Hyde v. Stone, 675.

I

Illinois Cent. R. Co. v. Bentz, 362, 369.
Illinois Cent. R. Co. v. France's Adm'x, 199.
Illinois Cent. R. Co. v. Hart, 647.
Illinois Cent. R. Co. v. Hecker, 307.
Illinois Cent. R. Co. v. Illinois, 135, 561.
Illius v. New York & N. H. R. Co., 497.
Independent Dist. of Pella v. Beard, 502.
Independent School Dist. of Sioux City, Iowa, v. Rew, 611, 624.
Indianapolis & St. L. R. Co. v. Horst, 677.
Innerarity v. Merchants' Nat. Bank, 417.
Interborough-Metropolitan Co., In re, 377.

[The figures refer to pages]

International Nav. Co. v. Farr & Bailey Mfg. Co., 317.
International Text-Book Co. v. Gillespie, 343.
Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 90.
Interstate Commerce Commission v. Baltimore & O. R. Co., 434, 435.
Iowa Life Ins. Co. v. Lewis, 578.
Irby v. Wilson, 83.
Irons v. Hussey, 77.
Irving Real Estate Co. v. Portland, 242.

J

Jackson v. Smith, 301.
Jackson ex dem. St. John v. Chew, 504.
Jackson & Sharp Co. v. Burlington & L. R. Co., 515.
Jacobs v. Glucose Sugar Refining Co., 562.
Jacobson v. Massachusetts, 680.
Jaffray v. Wolf, 423.
Jaffrey v. Brown, 659.
James v. Gillen, 100.
James v. James, 256.
Jamieson v. Potts, 390.
Jamison v. Burton, 394, 401.
Jansen v. Atchison, 213.
Jarnecke Ditch Co., In re, 599.
Jarvis v. Hitch, 435.
J. B. Bostic Co. v. Eggleston, 389.
Jefferson, In re, 685.
Jefferson v. Bangs, 248.
Jefferson Branch Bank v. Skelly, 339, 595, 606.
Jellenik v. Huron Copper Min. Co., 532.
Jencks v. Quidnick Co., 459.
Jenkins v. Ewin, 396.
Jennings v. Alaska Treadwell Gold Min. Co., 389.
Jennings v. State, 147.
J. E. Rumbell, The, 664.
Jessup v. Carnegie, 381, 382.
Jeter v. Hewitt, 511.
Jewett v. Hone, 627.
Jewett Car Co. v. Kirkpatrick Const. Co., 662.
Johannessen v. Johannessen, 304.
John Deere Plow Co. v. Anderson, 57.
John Deere Plow Co. v. McDavid, 658.
John Kyle Steamboat Co. v. New Orleans, 588.
Johnson v. Bridal Veil Lumbering Co., 74.
Johnson v. Charles D. Norton Co., 630, 636.
Johnson v. Crawford & Yothers, 595, 599.
Johnson v. Crook County, 177.
Johnson v. Fall, 431.
Johnson v. Lewis, 79.
Johnson v. St. Louis, 573, 602.
Johnson v. Seattle Electric Co., 295.
Johnson v. Union Pac. Coal Co., 429, 447.
Johnson's Adm'r v. Citizens' Bank of Richmond, 196.
Johnson's Estate, In re, 50.
Johnston v. Mutual Reserve Life Ins. Co., 345.
Johnston v. Southwestern R. Bank, 381, 397.
Johnston v. Straus, 497.
Jones v. Castor, 266.
Jones v. Charleston & W. C. R. Co., 269.
Jones v. Colbeck, 103.
Jones v. Davenport, 438.
Jones v. Great Southern Fireproof Hotel Co., 548, 609.
Jones v. Gulf, C. & S. F. R. Co., 302.
Jones v. Horn, 302.
Jones v. Mutual Fidelity Co., 662.
Jones v. New York & E. R. Co., 308.
Jones v. Randall, 159.
Jones v. Southern Pac. Co., 649.
Jones v. Sparrow, 131.
Jones v. U. S., 678.
Jordan v. Pickett, 423.
Joseph v. New Albany Steam Forge & Rolling-Mill Co., 673.
Joseph Dixon Crucible Co. v. Paul, 563.
Joslin v. Grand Rapids Ice Co., 215.
Joyce v. Newmark & Edwards, 242.
Judson v. Gray, 189.
Julian v. Beal, 294.
Julian v. Central Trust Co., 604.
June v. Purcell, 238.

K

Kaeiser v. Illinois Cent. R. Co., 558.
Kane v. Erie R. Co., 473, 474, 558.
Kane v. McCown, 175.
Kansas City Hydraulic Press Brick Co. v. National Surety Co., 638.
Kansas City Southern R. Co. v. Quigley, 662.
Kapp v. Kapp, 205.
Katzenberger v. Aberdeen, 562.
Kauffman v. Peacock, 120, 411.
Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 575.

[The figures refer to pages]

Kavanagh v. Barber, 155.
Kealoha v. Castle, 449.
Kean v. Rice, 387.
Kearny v. Buttles, 256, 258.
Keene v. Mould, 349.
Keene Five Cent Sav. Bank v. Reid, 369, 626, 636.
Kelley v. Crawfordsville, 300.
Kelley v. Rhoads, 213, 692.
Kellogg v. Lavender, 420.
Kellogg v. Page, 351.
Kelly v. Gwatkin, 344.
Kennedy v. Indianapolis, 576.
Kennedy's Heirs v. Kennedy's Heirs, 434.
Kennell v. Abbott, 159.
Kenneweg v. Allegany County Com'rs, 499.
Kentucky R. Tax Cases, 574.
Keokuk & W. R. Co. v. Missouri, 249.
Keokuk & W. R. Co. v. Scotland County Court, 503.
Kerlin v. Chicago, P. & St. L. R. Co., 536, 649.
Kessler v. Armstrong Cork Co., 448.
Kibbe v. Stevenson Iron Min. Co., 539.
Kidd v. Ransom, 324.
Kiernan v. Portland, 172.
Kightly v. Birch, 147.
Kilgore v. Bulkley, 411.
Kilkelly v. State, 390.
Kimball v. Grantsville City, 206.
King v. Davis, 603, 634.
King v. Dundee Mortgage & Trust Inv. Co., 477.
King v. Eccleston, 231.
King v. Humphery, 107.
King v. Lynn, 107.
King v. McLean Asylum of Massachusetts General Hospital, 290.
King v. Pauly, 44.
King v. Pomeroy, 177.
King v. St. Catharine's Hall, 163.
King v. Wilson, 480.
King v. Worthington, 292.
King v. Younger, 231.
Kinnear Mfg. Co. v. Carlisle, 649.
Kinney v. Clark, 561.
Kinney v. Conant, 321.
Kipper v. State, 342.
Kirby v. Boyette, 256.
Kirby v. Lake Shore & M. S. R. Co., 586.
Kirkpatrick v. Gibson, 434.
Kirman v. Powning, 393, 436.
Klages v. Kohl, 381.
Kline v. Baker, 382.
Klock, In re, 177.
Knapp, Stout & Co. v. McCaffrey, 529.
Kneeland v. Milwaukee, 200, 218, 240, 243, 246.
Knight, In re, 598.
Knight v. Finney, 287.
Knight v. Rawlings, 390.
Knight v. St. Louis, I. M. & S. R. Co., 47, 48.
Knight v. Shelton, 464, 596.
Knight v. West Jersey R. Co., 417, 420.
Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 556, 578.
Knox v. Randall, 193.
Knox County v. Ninth Nat. Bank, 488, 489.
Koehler, Ex parte, 105.
Koerner v. St. Louis Car Co., 178.
Kohler v. Agassiz, 408.
Kohn v. McKinnon, 396.
Kolb v. Swann, 192.
Koonce v. Doolittle, 59, 60.
Koontz v. Nabb, 401, 429.
Kountze v. Omaha, 588.
Kroeger v. Twin Buttes R. Co., 378.
Krogg v. Atlanta & W. P. R. Co., 398.
Krug, In re, 553.
Kuhn v. Fairmont Coal Co., 506, 507.

L

Lacy v. Gunn, 250.
Lafferty's Estate, In re, 263.
Lagrange v. Barre, 206.
Lahr v. Metropolitan E. R. Co., 132.
Laidlaw v. Oregon Ry. & Nav. Co., 664.
Lake Shore & M. S. R. Co. v. Prentice, 641.
Lamb v. Farrell, 509.
Lambert v. Barrett, 498.
Lamborn v. Dickinson County Com'rs, 561.
Lampman v. Milks, 38.
Lamson v. Mix, 659.
Lancaster County v. McDonald, 57, 175.
Lander v. Mercantile Nat. Bank, 698.
Lane v. Vick, 522.
Lane County v. Oregon, 591.
Lane & Co. v. Watson, 381.
Lane's Appeal, 64.
Lang v. U. S., 678, 687, 688.
Langford v. Wilkinson County Com'rs, 281.

[The figures refer to pages]

Langmuir v. Landes, 499.
Lanier v. State, 178.
Lapp v. Ritter, 562.
Largey v. Chapman, 390.
Larrabee v. Franklin Bank, 373.
Larson v. First Nat. Bank, 47.
Larson v. Salt Lake City, 36.
Larzelere v. Starkweather, 50.
Lascelles v. State, 417.
Lassiter v. Western Union Tel. Co., 70.
Laughlin v. Louisiana & New Orleans Ice Co., 337.
Lau Ow Bew v. U. S., 312.
Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 668.
Laurendeau v. Fugelli, 75.
Lauriat v. Stratton, 505.
Lauve, Succession of, 195, 233.
Lavender v. Rosenheim, 435.
Law v. Smith, 201.
Lawrence v. Wickware, 511.
Lawson v. Conaway, 162, 427.
Lawson v. Lawson, 109.
Lay v. Nashville, C. & St. L. R. Co., 398.
L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland, 574.
L. D. Willcutt & Sons Co. v. Driscoll, 133.
League v. Egery, 504
Leard v. Leard, 294.
Leavenworth County v. Barnes, 558.
Leavenworth, L. & G. R. Co. v. Coffin, 337.
Leavitt v. Blatchford, 205.
Leavitt v. Morrow, 209, 219.
Lebanon Bank v. Mangan, 360, 369.
Le Blanc, Succession of, 22, 114, 449, 451.
Le Bosquet v. Myers, 397.
Lee v. Citizens' Bank, 348.
Lee v. Kirby, 413.
Lee v. Missouri Pac. R. Co., 383.
Lee County v. Rogers, 488.
Leeper v. Texas, 561.
Leete v. State Bank of St. Louis, 406, 407.
Leffingwell v. Warren, 479, 480, 481, 502, 539, 548, 561, 565, 583.
Lehman v. Berdin, 574.
Leigh v. Everheart's Ex'r, 432.
Leighton v. Young, 318.
Leisy v. Hardin, 356.
Lemp v. Hastings, 100, 201.
Lender v. Kidder, 368.
Leonard, In re, 6, 404.
Leonard v. Columbia Steam Nav. Co., 381.
Leslie v. Urbana, 494.
Lester v. Board of Education, 50.
Letcher, In re, 351.
Letzkus v. Butler, 130.
Levy v. Hitsche, 245.
Levy v. Mentz, 366, 562.
Levy v. Stewart, 652.
Lewer v. Com., 433.
Lewis v. Campbell, 108.
Lewis v. Herrera, 457.
Lewis v. Long Island R. Co., 295.
Lewis v. Monson, 591.
Lewis v. Riggs, 132.
Lewis v. Symmes, 694.
Lewis v. Thornton, 53, 180.
Lewis v. Wilson, 191.
Leyner Engineering Works v. Kempner, 611, 654.
Lickbarrow v. Mason, 98, 118.
Liddell v. Landau, 345.
Liebman v. City & County of San Francisco, 550.
Lincoln County v. Luning, 675.
Lindley v. Davis, 390.
Lindsay v. Lindsay, 256.
Lindsley v. Natural Carbonic Gas Co., 561.
Linn v. Minor, 200, 260.
Lipschutz v. Horton, 281.
Litchfield v. Ballou, 656.
Littler v. Dielmann, 177.
Liverpool Waterworks Co. v. Atkinson, 109.
Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 369, 644.
Liverpool & London & Globe Ins. Co. v. Clunie, 558.
Livingston v. Moore, 529, 561.
Livingston v. Rector, etc., of Trinity Church in Trenton, 75.
Lloyd v. Matthews, 385.
Lobenstine v. Union Elevated R. Co., 513.
Lockard v. Asher Lumber Co., 578.
Lockhard v. Asher Lumber Co., 465.
Lockwood v. Carr, 308.
Loeb v. Mathis, 233.
Loeb v. Trustees of Columbia Tp., 488.
Logan County v. Carnahan, 247.
Lombard v. Lombard, 256.
London St. Tramways Co. v. London County Council, 188.
Long v. Laming, 34.
Long v. Long, 183.
Longbottom v. Berry, 218.
Long Island Water-Supply Co. v. Brooklyn, 575.
Lonstorf v. Lonstorf, 220.
Lookout Mt. R. Co. v. Houston, 290.

Loomis v. Carrington, 291.
Lord Northampton's Case, 144.
Lord Walpole v. Earl of Cholmondeley, 41.
Loring v. Marsh, 453, 472, 505, 581, 660.
Loring v. United States Vulcanized Gutta Percha Belting & Packing Co., 309.
Losecco v. Gregory, 79.
Louis Snyder's Sons Co. v. Armstrong, 276, 335.
Louisiana ex rel. Southern Bank v. Pilsbury, 564.
Louisville Trust Co. v. Cincinnati, 485.
Louisville & N. R. Co. v. Central Stockyards Co., 539.
Louisville & N. R. Co. v. Com., 344.
Louisville & N. R. Co. v. Daniel, 106.
Louisville & N. R. Co. v. Davidson County Court, 52, 177.
Louisville & N. R. Co. v. Gaines, 548.
Louisville & N. R. Co. v. Kentucky, 553.
Louisville & N. R. Co. v. Lansford, 569.
Louisville & N. R. Co. v. Palmes, 595, 606.
Louisville & N. R. Co. v. Sharp, 55.
Louisville & N. R. Co. v. Smith, 398.
Louisville & N. R. Co. v. Webb, 409.
Love v. Busch, 566.
Love v. Miller, 38.
Lovejoy v. Stewart, 696.
Lovelace v. Taylor, 55.
Lovett v. German Reformed Church, 34.
Lowe v. Prospect Hill Cemetery Ass'n, 265.
Lownsdale v. Portland, 74, 75.
Lucas v. Board of Com'rs of Tippecanoe County, 39, 167, 177.
Lucas v. Brooks, 685.
Luchterhand v. Sears, 263.
Luco v. De Toro, 78, 79, 135.
Luke v. Lyde, 613.
Luken v. Lake Shore & M. S. R. Co., 367.
Luther v. Borden, 498, 558.
Lyle v. Richards, 148.
Lyman, In re, 112.
Lyman v. Hilliard, 539, 544.
Lynch v. Knight, 214.
Lyon v. Clark, 347.
Lyon v. Mitchell, 360.
Lyons v. Hammond Elevator Co., 278.
Lyons v. Woods, 61.

M

Maass v. Rosenthal, 304.
Macbeth v. Gillinder, 326.
McCain v. Des Moines, 539, 560.
McCall v. Hancock, 489.
McCall's Ferry Power Co. v. Price, 54.
McCandless v. Richmond & D. R. Co., 338.
McCartney v. Osburn, 398.
McChesney v. Hager, 233.
McClain v. Davis, 102.
McClain v. Provident Sav. Life Assur. Soc., 577, 625.
McClaskey v. Barr, 509, 520.
McClintock v. South Penn. Oil Co., 159.
McCloskey v. Hamill, 324.
McCluny v. Silliman, 561.
McClure v. Owen, 366, 482.
McCollum v. McConaughy, 364, 366.
McConihay v. Wright, 656.
McCormick v. Bauer, 198.
McCormick v. Bonfils, 398.
McCormick v. Sullivant, 561.
McCoy v. Washington County, 558.
McCrary Bros. Co., In re, 587.
McCue v. Northwestern Mut. Life Ins. Co., 500, 501.
McCullough v. Virginia, 227, 606.
McCully v. State, 223.
McCurdy v. Baughman, 417.
McCurley v. Stockbridge, 441.
McCutcheon v. Homer, 133.
McCutcheon v. People, 394.
McDonald v. Davey, 94.
McDonald v. Hovey, 435.
McDonald v. Millaudon, 217.
McDonald's Estate, In re, 307.
McDonough v. Merten, 141.
McDowell v. Lindsay, 346, 357.
McDowell v. Oyer, 8, 201.
McElvain v. St. Louis & S. F. R. Co., 301, 338, 360.
McElvaine v. Brush, 539.
McElwee v. McElwee, 305.
McEvoy v. Sault Ste. Marie, 211.
McFadden v. Blocker, 389, 397.
Macfarland v. Byrnes, 701.
McFarland v. Pico, 200, 211.
McFarlane v. Griffith, 658.
McGill v. Holmes, Booth & Haydens, 193.
McGinness' Estate, Matter of, 84, 308.

[The figures refer to pages]

McGoon v. Shirk, 347.
McGovney v. Gwillim, 389.
McGraw v. Mott, 573.
McGrew v. Mutual Life Ins. Co., 449.
McIlwaine v. Iseley, 537.
McInhill v. Odell, 337.
McIntyre v. Ingraham, 366, 381.
McKee v. Brooks, 342.
McKeen v. Delancy, 504, 518, 562.
McKinney v. State, 263, 266, 285.
McKinnon v. McLean, 435.
McLucas v. St. Joseph & G. I. R. Co., 347.
McManus v. Chollar, 663.
McManus v. Lynch, 235.
McMaster v. Dyer, 692.
McMerty v. Morrison, 381.
MacMurray v. Gosney, 322.
McNaghten's Case, 150.
McNeely v. Williames, 333.
McNiel v. Holbrook, 682.
McNutt v. McNutt, 389.
McPeck v. Central Vermont R. Co., 646, 649.
McPherson v. Mississippi Valley Trust Co., 523.
McPike v. Wells, 523.
McQuillan v. Donahue, 55.
McVay's Adm'r v. Ijams, 252.
McWilliams v. Bonner, 198.
Maddox v. Graham, 223, 225, 228.
Maddox v. U. S., 44.
Madison Square Bank v. Pierce, 441.
Madlem's Appeal, 77.
Madrid, The, 209, 248.
Magee v. Northern Pac. C. R. Co., 177.
Mahan v. Wood, 287.
Maiorano v. Baltimore & O. R. Co., 568.
Malan v. Simpson, 309.
Malloy v. American Hide & Leather Co., 562, 611.
Maloney v. Jones, 274.
Manhattan Life Ins. Co. v. Albro, 578.
Manley v. Park, 574.
Mann v. Carter, 390.
Manship v. New South Building & Loan Ass'n, 322, 653.
Manufacturers' & Farmers' Bank v. Bayless, 511.
Many v. Sizer, 323.
Mapes v. Burns, 136.
Marbury v. Kentucky Union Land Co., 576.
Marbury v. Madison, 73.
Marfield v. Goodhue, 360.
Mariner v. Oconto Land Co., 239.
Marks v. Morris, 432.
Marks v. Sullivan, 417.
Marlatt v. Silk, 653.
Marqueze v. Caldwell, 435.
Marshall County Sup'rs v. Schenck, 369, 490, 629.
Martin v. Bennett, 301.
Martin v. Chicago & M. Electric R. Co., 281.
Martin v. Hoggatt, 295.
Martin v. People's Bank, 271, 272.
Martin v. St. Joseph, 302.
Martin v. Waddell, 507.
Martin's Ex'x v. Martin, 182.
Marx v. Croisan, 120.
Mason v. A. E. Nelson Cotton Co., 102, 202, 257, 261, 689.
Mason v. Burk, 266, 270.
Mason City & Ft. D. R. Co. v. Union Pac. R. Co., 170.
Mason City & Ft. D. R. Co. v. Wolf, 199.
Mast, Foos & Co. v. Stover Mfg. Co., 12, 321.
Matheson's Heirs v. Hearin, 250, 252.
Matthews v. Sands, 283.
Matthews v. Warner, 537.
Mattis v. Boggs, 422.
Matz v. Chicago & A. R. Co., 465, 545.
Mauch v. Hartford, 297.
May v. Brown, 163.
May v. Buchanan County, 675.
May v. Finley, 302.
May v. Tenney, 576.
Mayer v. Erhardt, 177.
Mayman v. Reviere, 244.
Mayo v. Board of Com'rs of Washington, 138.
Mead v. McGraw, 247.
Mead v. Portland, 608.
Meade v. Beale, 453, 523, 627, 659.
Meakings v. Ochiltree, 434.
Mearns v. Central R. R. of New Jersey, 632.
Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co., 551.
Mechanics' & Traders' Bank v. Debolt, 339.
Mechanics' & Traders' Bank v. Thomas, 339.
Mechanics' & Traders' Bank of Jersey City v. Dakin, 298.
Medland v. Van Etten, 263.
Meeker v. Lehigh Val. R. Co., 282.
Meigs v. London Assur. Co., 634.
Meister v. Moore, 561.
Mella v. Northern S. S. Co., 311.
Memphis & C. R. Co. v. Gaines, 561.
Menken v. Frank, 176.

[The figures refer to pages]

Mercantile Nat. Bank v. Lander, 698.
Mercantile Trust & Deposit Co. of Baltimore v. Columbus Waterworks Co., 485.
Mercer County v. Cowles, 676.
Merchants' Laclede Bank of St. Louis, Mo., v. Troy Grocery, 347.
Merchants' Nat. Bank v. Goodman, 412.
Merchants' & Manufacturers' Nat. Bank v. Pennsylvania, 557.
Merchants' & Miners' Transp. Co. v. Borland, 360.
Merriam v. St. Louis, C. G. & Ft. S. R. Co., 55.
Merrill v. Portland, 562.
Merrimac Min. Co. v. Levy, 381.
Messinger v. Anderson, 464, 477.
Metropolitan R. Co. v. Moore, 388.
Metzger v. Greiner, 694.
Metzler v. Wenzel, 55.
Meuer v. Chicago, M. & St. P. R. Co., 397, 400.
Meyer v. Consolidated Ice Co., 669.
Meyer v. Goodyear India-Rubber Glove Mfg. Co., 324.
Michael v. Morey, 173.
Michigan Cent. R. Co. v. Myrick, 640.
Michigan Trust Co. v. Ferry, 610.
Middleton v. McGrew, 504.
Milan, The, 103.
Milbourn v. Baugher, 289.
Miles v. Caldwell, 510.
Miles v. National Bank of Kentucky, 217.
Milford & U. St. R. Co. v. Cline, 639.
Miller v. Ammon, 560.
Miller v. Anderson, 406.
Miller v. Holstein, 437.
Miller v. Hulbert, 306.
Miller v. McNeill, 436.
Miller v. Marigny, 52, 177.
Miller v. Norfolk & W. R. Co., 672.
Miller v. State, 338.
Miller v. Tyler, 700.
Miller & Lux v. Enterprise Canal & Land Co., 195.
Miller & Lux v. Rickey, 278.
Minahan v. Minahan, 198.
Minnesota Min. Co. v. National Min. Co., 237.
Minor v. Atlanta, 300.
Mirehouse v. Rennell, 154, 160.
Mires v. St. Louis & S. F. R. Co., 347.
Mississippi Mills v. Cohn, 656.
Missouri, K. & E. R. Co. v. Holschlag, 55.
Missouri, K. & T. R. Co. v. McCann, 561.
Missouri, K. & T. R. Co. v. Steinberger, 301.
Missouri, K. & T. R. Co. v. Walker, 378.
Missouri, K. & T. R. Co. v. Wise, 378.
Missouri, K. & T. R. Co. of Texas v. Graves, 301.
Missouri, K. & T. R. Co. of Texas v. Rogers, 379.
Missouri, K. & T. R. Co. of Texas v. Swartz, 345.
Missouri, K. & T. R. Co. of Texas v. Williams, 301.
Missouri, K. & T. Trust Co. v. Krumseig, 537, 581.
Missouri Pac. R. Co. v. State, 394.
Mitchell v. Burlington, 242.
Mitchell v. Lippincott, 485.
Mitchell v. Wabash R. Co., 279.
Mohl v. Lamar Canal Co., 558.
Mohr v. Manierre, 631.
Moinet v. Burnham, Stoepel & Co., 47.
Molhoff v. Chicago, R. I. & P. R. Co., 378.
Molony v. Dows, 47.
Monaghan v. Cox, 150.
Mong v. Bell, 268.
Monkton v. Attorney General, 107.
Montana v. Rice, 557.
Montgomery v. Crossthwait, 426.
Montgomery v. McDermott, 281, 461.
Montgomery County Fiscal Court v. Trimble, 206.
Mooney v. Edwards, 99.
Mooney v. Hinds, 337.
Mooney v. Humphrey, 531.
Moore v. Albany, 183, 192.
Moore v. Allen, 347.
Moores v. Citizens' Nat. Bank, 583, 584.
Morenci Copper Co. v. Freer, 550, 552.
Morgan v. Curtenius, 478.
Morgan v. First Nat. Bank, 529.
Morgan v. State, 393.
Morgan v. Surman, 215.
Morgan v. Town Clerk, 561.
Morgan's Heirs v. Parker, 198.
Moriarty v. New York, 50.
Morley v. Lake Shore & M. S. R. Co., 581.
Morris v. Clarkson, 64.
Morris v. Hitchcock, 397.
Morris v. Indianapolis, 401.
Morris v. Norton, 684.
Morris v. Taylor, 438.

[The figures refer to pages]

Morris v. U. S., 547.
Morrison v. Marker, 661.
Morse v. Goold, 79.
Morse v. Riblet, 526.
Morse v. Tackaberry, 677.
Moses v. Lawrence County Bank, 566.
Mosher v. Huwaldt, 180, 183.
Mott v. Clayton, 238.
Mottu v. Davis, 338.
Moulton v. Chafee, 580.
Mount v. Manhattan Co., 349.
Mountain Grove Bank v. Douglas County, 694.
Mt. Zion Baptist Church v. Whitmore, 75.
Mowat v. Brown, 450.
Mulford v. Estudillo, 58, 175.
Mullany v. First Nat. Bank, 266.
Mullins v. Blaise, 114, 451.
Munger Vehicle Tire Co., In re, 573.
Municipal Court of Providence v. Bostwick, 168.
Munster v. Lamb, 179.
Murff, In re, 367.
Murphey v. Brown, 397.
Murphy v. Factors' & Traders' Ins. Co., 355.
Murphy v. Nelson, 390.
Murphy v. Willow Springs Brewing Co., 195.
Murray v. Chicago & N. W. R. Co., 30, 158, 586, 633.
Murray v. Wilson Distilling Co., 485.
Mutual Assur. Soc. v. Watts, 497, 561.
Mutual Life Ins. Co. of New York v. Lane, 544.
Mutual Safety Ins. Co. v. Cargo of the George, 627.
Myer v. Wheeler, 417.
Myers v. Hazzard, 518.
Myers v. McGavock, 392.
Myers v. Reed, 505.
Mynard v. Syracuse, B. & N. Y. R. Co., 362, 369.
Myrick v. Heard, 481, 505, 565.
Myrick v. Michigan Cent. R. Co., 644.
Myrick v. Railroad Co., 630.

N

Nalley v. Hartford Carpet Co., 407.
Nash v. McNamara, 347.
Nash v. Simpson, 419.
Nathan v. Lee, 398.
National Bank of Commerce of Kansas City v. Morris, 444.
National Bank of Michigan v. Green, 398.
National Bank of Oxford v. Whitman, 465, 539.
National Cash-Register Co. v. American Cash-Register Co., 324, 327, 332.
National Cotton Oil Co. v. Texas, 597.
National Folding Box & Paper Co. v. Dayton Paper Novelty Co., 324.
National Folding Box & Paper Co. v. Phœnix Paper Co., 326.
National Foundry & Pipe Works v. Oconto Water Co., 477.
National Grocer Co., In re, 586.
National Live Stock Commission Co. v. Taliaferro, 397.
National Mut. Building & Life Ass'n v. Brahan, 582.
National Park Bank v. Remsen, 572.
National Soc. of United States, Daughters of 1812, v. American Surety Co. of New York, 342.
Neal v. Green, 493.
Neal's Lessee v. Green, 319, 541.
Nelson v. Goree's Adm'r, 381, 401.
Nelson v. Stull, 389.
Nelson v. Van Gazelle Mfg. Co., 143.
Nesmith v. Sheldon, 558.
Nessmith v. Shelden, 318.
Neves v. Scott, 453, 655, 656.
New v. Oklahoma, 43.
Newcoman v. Bethlem Hospital, 124.
New England Mortg. Security Co. v. Gay, 544.
New England Screw Co. v. Bliven, 666.
New Hampshire v. Grand Trunk Ry., 562.
New Haven Pulp & Board Co. v. Downington Mfg. Co., 672.
Newman v. Keffer, 505.
Newmarket Bank v. Butler, 338.
New Orleans, M. & C. R. Co. v. New Orleans, 291.
New Orleans Waterworks Co. v. Southern Brewing Co., 494.
Newport News & M. V. Co. v. Howe, 649.
Newton & Co., In re, 525.
New York Cent. & H. R. Co. v. Price, 175, 583.

[The figures refer to pages]

New York C. R. Co. v. Lockwood, 644, 651.
New York Filter Mfg. Co. v. Jackson, 325, 327.
New York Firemen Ins. Co. v. De Wolf, 294.
New York, L. E. & W. R. Co. v. Pennsylvania, 561.
New York Life Ins. Co. v. Allison, 512.
New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County, Ohio, 562.
New York Life Ins. Co. v. Cravens, 577.
New York Life Ins. Co. v. English, 381.
New York, N. H. & H. R. Co. v. Cockcroft, 669.
New York, N. H. & H. R. Co. v. O'Leary, 647.
New York Security & Trust Co. v. Lombard Inv. Co., 517.
New Zealand Ins. Co. v. Earnmoor S. S. Co., 664.
Nichols v. Fanning, 307.
Nichols v. Levy, 502.
Nickels v. Com., 256.
Nicollet Nat. Bank v. City Bank, 389.
Nicolls v. Rodgers, 584.
Nigro's Estate, In re, 243.
Nininger v. Board of Com'rs of Carver County, 197.
Noble v. Mitchell, 578.
Nobles v. Georgia, 567.
Norfolk & P. Traction Co. v. Miller, 647.
Norfolk & W. R. Co. v. Old Dominion Baggage Co., 435.
North Carolina v. Gosnell, 292.
North Carolina Min. Co. v. Westfeldt, 507.
North Chicago St. R. Co. v. Le Grand Co., 431.
Northcutt v. Eager, 392.
Northern Bank of Kentucky v. Hunt's Heirs, 241.
Northern Nat. Bank v. Hoopes, 629.
Northern Pac. R. Co. v. Hogan, 593.
Northern Pac. R. Co. v. Peterson, 649.
Northern Pac. R. Co. v. Sanders, 307, 320.
Northern R. R. v. Concord R. R., 77.
North River Steamboat Co. v. Livingston, 356.
North Shore Boom & Driving Co. v. Nicomen Boom Co., 352.
Northwestern Sav. Bank v. Centerville Station, Ill., 489.
Northwestern Union Packet Co. v. Clough, 685.
Nortnass v. Pioneer Townsite Co., 256.
Norton v. Brownsville Taxing Dist., 138.
Norton v. Wheaton, 330, 331.
Nottage v. Jackson, 441.
Nuckolls v. Gaut, 151.
Nudd v. Burrows, 677.

O

Oakes v. Mase, 549.
Oakley v. Aspinwall, 49, 137.
Oates v. First Nat. Bank, 369, 627.
O'Brien v. Moffitt, 285.
O'Brien v. New York, 61.
O'Brien v. Wheelock, 491.
Ocean Beach Ass'n v. Brinley, 248.
Oceanic Steam Nav. Co. v. Aitken, 317.
O'Connell v. Queen, 120.
O'Day v. Sanford, 301.
Oelberman v. Merritt, 65.
Office Specialty Mfg. Co. v. Winternight & Cornyn Mfg. Co., 325.
Ogden v. Larrabee, 283.
Oglesby v. Attrill, 276, 334.
O'Halloran v. McGuirk, 679.
Ohio River R. Co. v. Fisher, 693.
Olcott v. Fond du Lac County Sup'rs, 550, 562, 563, 588.
Olcott v. Tioga R. Co., 190.
Old Dominion Copper Mining & Smelting Co. v. Bigelow, 149, 345.
Oleson v. Wilson, 394.
Oliver, In re, 580.
Oliver v. Clarke, 507.
Oliver v. Omaha, 562, 675.
Ollre v. State, 390.
Olmstead v. Partridge, 150.
Opinion of the Justices, In re, 88, 89, 337.
Orme v. Richmond, 406.
O'Rourke v. Clopper, 196.
Orr v. Bank of United States, 154.
Orvis v. Powell, 502, 515.
Osborn v. Bank of United States, 600.
Osborne v. Barnett, 338.
Osborne v. Cabell, 124.
Osborne v. Florida, 590.
Osborne v. Home Life Ins. Co., 392.
Ott, In re, 589.
Ott v. Lake Shore & M. S. R. Co., 384.
Overall v. Ellis, 266.
Overheiser v. Morehouse, 309.

Overman Wheel Co. v. Curtis, 325.
Oxnard v. Varnum, 417.

P

Pabst Brewing Co. v. Terre Haute, 597.
Pabst Brewing Co. v. Thorley, 508.
Pacific Coast S. S. Co. v. U. S., 295.
Packer v. Whittier, 668.
Paddock v. Missouri Pac. R. Co., 303, 364.
Padelford v. Savannah, 338.
Paine v. Germantown Trust Co., 591.
Paine v. Willson, 505.
Paine v. Wright, 562.
Palmer v. Lawrence, 230, 295.
Palmer's Adm'rs v. Mead, 185.
Parke v. Boulware, 243.
Parker v. Atlantic C. L. R. Co., 55.
Parker v. Moore, 651, 653.
Parker v. Phetteplace, 576.
Parker v. Pomeroy, 191, 269.
Parker v. State, 73.
Parks v. Watson, 588.
Parrot v. Mexican Cent. R. Co., 274.
Parsons v. State, 150, 157.
Parton v. Williams, 118.
Partridge v. Phœnix Mut. Life Ins. Co., 667.
Pasley v. Freeman, 157.
Pass v. McRea, 50, 52.
Patapsco Guano Co. v. Morrison, 470.
Patton v. Illinois Cent. R. Co., 647.
Paul v. Davis, 200.
Paulson v. Portland, 256.
Payne v. Hook, 676.
Peabody v. Landon, 119.
Pease v. Peck, 454, 467, 478, 483, 485.
Peck v. Ayers & Lord Tie Co., 661.
Peel v. Elliott, 276, 334.
Peeler v. Peeler, 134.
Pegram v. American Alkali Co., 545.
Peik v. Chicago & N. W. R. Co., 556.
Peirce v. Van Dusen, 593.
Pence v. Cochran, 580.
Penfield v. Chesapeake, O. & S. W. R. Co., 584.
Penn v. Bornman, 366.
Pennington v. Gillaspie, 691.
Pennock v. Dialogue, 434, 435.
Pennoyer v. Neff, 169, 455, 456.
Pennsylvania Co. v. Fishack, 649.
Pennsylvania Co. v. State, 227.
Pennsylvania R. Co. v. Duncan, 338, 344.
Pennsylvania R. Co. v. Hummel, 611, 631.
Pennsylvania R. Co. v. National Docks & N. J. J. C. R. Co., 575.
Pennsylvania R. Co. v. National Docks & N. J. J. C. R. Co., 456.
Pennsylvania Steel Co. v. Lakkonen, 592.
People v. Albertson, 231.
People v. American Loan & Trust Co., 304.
People v. Board of Police Com'rs of City of Yonkers, 170.
People v. Boylan, 102.
People v. Brooklyn, 108, 110.
People v. Burbank, 396.
People v. Cicott, 244.
People v. Dayton, 306.
People v. Detroit White Lead Works, 287.
People v. Droste, 183.
People v. Gardner, 193.
People v. Leubischer, 177.
People v. Linda Vista Irr. Dist., 366.
People v. McGuire, 295.
People v. Markham, 130.
People v. New York, 79.
People v. Read, 175.
People v. Ritchie, 378.
People v. Rourke, 263.
People v. Snyder, 263.
People v. State Board of Tax Com'rs, 177.
People v. Swaile, 281.
People v. Wemple, 338, 344.
People v. Willcox, 366.
People v. Williams, 442.
People v. Wilson, 216.
People v. Winkler, 50.
People's Nat. Bank v. Marye, 562.
People's Sav. Bank v. Layman, 659.
Percy Summer Club v. Astle, 498.
Perkins v. Boston & A. R. Co., 562.
Perkins v. Clements, 185.
Perkins v. Morse, 406.
Perrine v. Thompson, 477.
Perry v. Baker, 275.
Perry v. House of Refuge, 441.
Perry v. Wheeler, 366, 506.
Perry Mfg. Co. v. Brown, 576.
Phalen v. Virginia, 561.
Phelan v. San Francisco, 264, 266.
Phelps v. Borland, 407.
Phelps v. Harris, 522.
Phelps v. O'Brien County, 676.
Phelps County Farmers' Mut. Ins. Co. v. Johnston, 279.

[The figures refer to pages]

Phenix Ins. Co. v. Pennsylvania R. Co., 415.
Philadelphia & E. R. Co. v. Catawissa R. Co., 73.
Phillips v. Huntington, 63.
Phillips v. Mackay, 162.
Phillips v. Negley, 410.
Phipps v. Harding, 629.
Phœnix Bridge Co. v. Castleberry, 611, 634.
P. H. & F. M. Roots Co. v. New York Foundry Co., 281.
Pickens v. Gillam, 451.
Pickens Tp. v. Post, 489.
Pickle v. Muse, 371, 372.
Pierce v. Pierce, 690.
Pike v. Daly, 118.
Pine Grove Tp. v. Talcott, 454.
Pinkham v. Crocker, 410.
Pioneer Gold Min. Co. v. Baker, 525.
Piqua Branch of State Bank of Ohio v. Knoop, 339, 595.
Pitcock v. State, 211, 256.
Pitt v. Pitt, 159.
Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 694.
Platt v. Bonsall, 362, 369.
Plattner Implement Co. v. Bradley, Alderson & Co., 263.
Plattner Implement Co. v. International Harvester Co. of America, 276, 334.
Pleasant Tp. v. Ætna Life Ins. Co., 483, 490.
Pledge v. Carr, 117, 306.
Plotke, In re, 598.
Plummer v. Plummer, 119, 235.
Poindexter v. Greenhow, 602.
Poire v. Wells, 350.
Polk v. Mutual Reserve Fund Life Ass'n, 525.
Polk v. Wendal, 504, 562.
Pollock v. Farmers' Loan & Trust Co., 177, 226.
Pomeroy v. Pomeroy, 390.
Pond v. Irwin, 256.
Pond v. U. S., 603.
Pontalba v. Copland, 341.
Poole v. Kermit, 298, 376.
Pooler v. U. S., 682.
Pope v. Porter, 363.
Post v. Pearson, 282.
Post v. Supervisors, 557.
Post's Estate, In re, 280.
Postal Tel. Cable Co. v. Farmville & P. R. Co., 133.
Potter v. Third Nat. Bank, 683.
Poultney v. Tiffany, 196.
Powers v. Detroit, G. H. & M. R. Co., 608.
Powers v. Smith, 39.
Pratt v. Breckinridge, 200.
Pratt v. Brown, 93.
Pratt v. Miller, 391.
Preston v. Funnell, 140.
Preston Nat. Bank v. Wayne Circuit Judge, 393.
Price v. Toledo, 700.
Princess Alexandra, The, 493.
Priority of Legislative Appropriations, In re, 90.
Proctor-Gamble Co. v. Warren Cotton Oil Co., 572.
Protector, The, 652.
Providence Washington Ins. Co. v. Adler, 143, 450.
Pugh v. Golden Valley R. Co., 119.
Purcell v. Macnamara, 94.
Purvis v. Harmanson, 341.
Putnam v. Rees, 76.
Pyles v. Riverside Furniture Co., 256.

Q

Quaker City Nat. Bank v. Nolan County, 546.
Quarman v. Burnett, 214.
Queen v. Chantrell, 231.
Quinette v. Bisso, 569.
Quinn v. Chicago, B. & Q. R. Co., 159.
Quinton v. Neville, 270.

R

Rabb v. La Feria Mut. Canal Co., 301.
Rackemann v. Wood, 398.
Rahm v. Chicago, R. I. & P. R. Co., 398.
Railton v. People, 306.
Railway Gross Receipts, Case of, 376.
Railway Passenger Assur. Co. of Hartford v. Pierce, 340, 365.
Rainwater-Boogher Hat Co. v. Malcolm, 564.
Ramsden v. Knowles, 572.
Randall v. Brigham, 554.
Randall v. National Bldg., Loan & Protective Union of Minneapolis, 298.
Randolph's Ex'r v. Quidnick Co., 564, 576.
Ransier, In re, 271, 273.
Raphael v. Trask, 285.
Rara Avis G. & S. M. Co. v. Bouscher, 180.
Rasmussen v. Idaho, 557.
Raymond v. Terrebonne, 562.

[The figures refer to pages]

Reclamation District No. 108 v. Hagar, 558.
Rector v. Danley, 266.
Red River Nat. Bank v. De Berry, 397.
Reed v. Atlantic & P. R. Co., 306, 320, 323.
Reed v. Ownby, 256, 261, 416.
Reed v. Reed, 199.
Reed v. Ring, 270.
Rees v. McDaniel, 238.
Rees v. Olmstead, 558.
Rees v. Olmsted, 489.
Reese v. Western Union Tel. Co., 405.
Reeve v. Colusa Gas & Electric Co., 692.
Regina v. Hughes, 83.
Reichert v. McClure, 256.
Reid v. People, 74.
Reid v. Wayne Circuit Judge, 246.
Reid, Murdock & Co. v. Northern Lumber Co., 381.
Reid & Beam v. Southern R. Co., 344.
Reiff v. Mullholland, 278.
Relle v. Western Union Tel. Co., 405.
Remey v. Iowa Cent. R. Co., 200.
Renaud v. Abbott, 667.
Rennell v. Bishop of Lincoln, 64, 67.
Reno Smelting, Milling & Reduction Works v. Stevenson, 444.
Republic Ins. Co. v. Williams, 667.
Requa v. Graham, 389.
Revell v. Hussey, 50.
Reymond v. Newcomb, 390.
Reynolds v. Crawfordsville First Nat. Bank, 656.
Reynolds v. Davis, 192, 307.
Reynolds v. Waring, 232.
Rhea v. State, 393.
Rhoads v. Chicago & A. R. Co., 394.
Rhoads v. Metropolis, 417.
Ricard v. New Providence Tp., 671.
Rice v. Adler-Goldman Commission Co., 574.
Rice v. Frayser, 576.
Rice v. Jerome, 588.
Rice v. Van Why, 274.
Richardson v. Curtis, 540.
Richardson v. Marshall County, 58, 694.
Richardson v. Woodward, 587, 599.
Richardson Drug Co. v. Raymond, 192.
Richey v. Cleveland, C., C. & St. L. R. Co., 300.
Richman v. Sup'rs of Muscatine County, 274.
Richmond St. R. Co. v. Reed, 263, 266.
Ricketts v. Spraker, 227.
Rigg v. Wilton, 389.
Riggins v. Waco, 42.
Riley v. Anderson, 627.
Ritten v. Griffith, 208.
Roberts v. Bolles, 611.
Roberts v. Lewis, 670.
Roberts v. Northern Pac. R. Co., 601.
Robertson's Will, In re, 411.
Robey v. State Ins. Co., 216.
Robinson v. Belt, 389, 396, 528, 564.
Robinson v. Commonwealth Ins. Co., 627.
Robinson v. Galveston, 302.
Robinson v. Schenck, 228.
Roche v. Jordan, 330.
Rochester v. Armour, 406, 407.
Rochester & G. V. R. R. v. Clarke Nat. Bank, 137, 294.
Rocker v. Metzger, 256.
Rockhill v. Nelson, 244, 256, 257, 259.
Rock Island Nat. Bank v. Thompson, 353.
Rockwell v. Warren County, 86.
Rodwell v. Rowland, 177, 225.
Roe v. Galliers, 78.
Roe v. Griffits, 214.
Rogers v. Cincinnati, N. O. & T. P. R. Co., 570.
Rogers v. Decker, 39.
Rogers v. Goodwin, 238.
Rogers Park Water Co. v. Chicago, 298, 376.
Rohrbach v. Germania Fire Ins. Co., 167, 172.
Rolt v. Watson, 101, 431.
Romaine v. Kinshimer, 200.
Rondot v. Rogers Tp., 489.
Roof v. Charlotte, C. & A. R. Co., 217.
Roots Co. v. New York Foundry Co., 281.
Rosenbaum v. United States Credit System Co., 381.
Rosenblatt, Ex parte, 358.
Rosenzweig v. Thompson, 99.
Ross v. Board of Sup'rs of Outagamie County, 73.
Ross v. Doe ex dem. Barland, 561.
Ross v. McLung, 518, 561.
Ross v. Ross, 239.
Rothschild v. Grix, 243.
Rothschild v. Hasbrouck, 576.
Roubicek v. Haddad, 381.
Roundtree, Ex parte, 396.
Rouse, Hazard & Co. v. Donovan, 401.

[The figures refer to pages]

Rowan v. Runnels, 486, 609.
Rowland v. Biesecker, 684.
Rugley v. Robinson, 349.
Rummel v. Butler County, 505, 562.
Rumsey v. New York & N. E. R. Co., 200.
Runk v. Thomas, 50.
Runyan v. Winstock, 244.
Rush v. French, 166, 172, 425.
Rush v. Moore, 305.
Russell v. Grigsby, 637.
Russell v. Hartley, 196.
Russell v. Southard, 656.
Russell v. United States Trust Co. of New York, 522.
Russell's Adm'r v. Russell's Guardian, 301.
Rutkowsky v. Bozza, 390.
Rutledge v. Rutledge, 301.
Ryan v. Bindley, 685.
Ryan v. New York, 46.
Ryan v. Staples, 488, 633.

S

Sackett v. McCaffrey, 680.
Sacramento Bank v. Alcorn, 242.
Sadgrove v. Kirby, 163.
Sadler v. Boston & Bolivia Rubber Co., 377.
Saffell v. Orr, 250.
Sage v. Reeves, 301.
St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, 533.
St. Louis v. Rutz, 505.
St. Louis, I. M. & S. R. Co. v. Maddry, 113, 127, 451.
St. Louis, I. M. & S. R. Co. v. State, 344.
St. Louis, I. M. & S. R. Co. v. Vickers, 677.
St. Louis, K. & N. W. R. Co. v. Clark, 241.
St. Louis Nat. Bank v. Hoffman, 390.
St. Louis, O. H. & C. R. Co. v. Fowler, 234.
St. Louis R. Co. v. Southern R. Co., 256.
St. Louis Southwestern R. Co. of Texas v. Holt, 301.
St. Louis & S. F. R. Co. v. Conrad, 386.
St. Nicholas Bank of New York v. State Nat. Bank, 398.
St. Regis Paper Co. v. Santa Clara Lumber Co., 271, 273.
Salmons v. Norfolk & W. R. Co., 647, 649.
Saloy v. New Orleans, 337.
Samuel v. Cheney, 116.
San Diego Flume Co. v. Souther, 571.
Sandusky City Bank v. Wilbor, 339.
Sanford v. Poe, 87, 318.
Sanford v. Portsmouth, 671.
Sanger v. Flow, 564.
San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 175.
San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co., 467.
Santa Cruz County v. Barnes, 389.
Santee River Cypress Lumber Co. v. James, 520.
Saranac Land & Timber Co. v. Roberts, 315.
Sauer v. New York, 513.
Sauer v. Steinbauer, 195.
Saveland v. Fidelity & C. Co., 120, 411.
Savings Ass'n of St. Louis v. O'Brien, 381.
Sawyer v. Oakman, 640.
Sayers v. Hoskinson, 445.
Schafer v. St. Louis & H. R. Co., 301.
Schell v. Fauché, 317.
Schempp v. Beardsley, 274.
Schenck v. Marshall County, 627.
Schlereth v. Missouri Pac. R. Co., 216.
Schmaltz v. York Mfg. Co., 381.
Schofield v. Goodrich Bros. Banking Co., 571.
Schoolfield v. Rhodes, 656.
Schoonover v. Birnbaum, 252.
Schori v. Stephens, 255.
Schott v. Harvey, 121, 413.
Schreiber v. Sharpless, 596.
Schultze v. Alamo Ice & Brewing Co., 134.
Schurmeier v. Connecticut Mut. Life Ins. Co., 671, 676.
Schwarcz v. International Ladies' Garment Workers' Union, 297.
Scipio v. Wright, 573.
Scott v. Fields, 444.
Scott v. King, 295, 301.
Scott v. McNeal, 610.
Scott v. Mineral Development Co., 520.
Scott v. Neely, 662.
Scott v. Sandford, 479, 498.
Scott v. Stewart, 256.
Scott v. Toledo, 574.
Scottish Union & Nat. Ins. Co. v. Wade, 168.
Seaboard Air Line Ry. v. Simon, 345.
Seaboard Nat. Bank of New York v. Woesten, 302.

[The figures refer to pages]

Seale v. Mitchell, 223, 231.
Searls v. Worden, 324, 325, 326.
Seccomb v. Wurster, 470.
Secombe v. Milwaukee & St. P. R. Co., 531.
Second Nat. Bank of Colfax v. Anglin, 426.
Secor v. Singleton, 588.
Security Nat. Bank v. St. Croix Power Co., 350.
Security Trust Co. v. Black River Nat. Bank, 585.
Sedgwick v. Sedgwick, 123.
Seefeld v. Duffer, 509, 663.
Seery v. Murray, 274.
Seither v. Philadelphia Traction Co., 404.
Semple v. Bank of British Columbia, 571.
Senate Bill No. 65, In re, 90.
Sesler v. Montgomery, 151.
Sessinghaus v. Knoche, 278.
Shapter's Estate, In re, 389.
Sharp v. Whiteside, 291.
Shaw v. Hoffman, 389.
Sheets v. Mississippi River & Bonne Terre Ry., 301.
Sheets Printing & Mfg. Co., In re, 525.
Sheffey's Ex'r v. Gardiner, 417.
Sheffield & S. W. Permanent Bldg. Soc. v. Harrison, 218.
Shelby v. Guy, 459, 564, 584.
Shelby County R. Co. v. Crow, 301.
Shelby Ice & Fuel Co. v. Southern R. Co., 343.
Shelden v. Miller, 387.
Sheldon's Lessee v. Newton, 256.
Shelley's Case, 104.
Shelton v. Hamilton, 360, 362, 369.
Sheppey v. Stevens, 651.
Sheridan v. Salem, 231.
Sheridan v. Tucker, 306.
Sherman v. Grinnell, 680.
Shipley v. Metropolitan St. R. Co., 301.
Shipp v. Miller, 502, 561.
Shires v. Allen, 173.
Shively v. Bowlby, 506.
Shoemaker v. Cincinnati, 228.
Shoenberg v. Heyer, 183.
Shumaker v. Pearson, 243.
Shutt v. Shutt, 213.
Siegert v. Abbott, 351.
Simonds Counter Machinery Co. v. Knox, 324.
Simpson v. Mundee, 150.
Sims, In re, 347.
Sims v. American Nat. Bank of Ft. Smith, 371.
Sims' Lessee v. Irvine, 454.
Singer Mfg. Co. v. Adams, 588.
Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America, 531.
Skelly v. Jefferson Branch Bank of Ohio, 339.
Slaght v. Northern Pac. R. Co., 350.
Slocum v. Wheeler, 353.
Small v. Westchester Fire Ins. Co., 578.
Smiley v. Kansas, 552.
Smith, Ex parte, 224.
Smith v. Au Gres Tp., Mich., 669.
Smith v. Baker, 391, 392.
Smith v. Bartram, 383.
Smith v. Clay, 106.
Smith v. Cowell, 372.
Smith v. Dayton Coal & Iron Co., 394.
Smith v. Doe, 36, 128.
Smith v. Farr, 337.
Smith v. Ferries & C. H. R. Co., 242.
Smith v. Fond du Lac, 473.
Smith v. Kernochen, 572.
Smith v. Lehigh Val. R. Co., 301.
Smith v. McDonald, 257.
Smith v. Pedigo, 76.
Smith v. Rentz, 46.
Smith v. Schwed, 292.
Smith v. Shriver, 480.
Smith v. Smith, 206.
Smith v. Tallapoosa County, 558.
Smoot v. Lafferty, 364.
Snare & Triest Co. v. Friedman, 463, 639.
Snead v. Central of Georgia R. Co., 313, 347.
Snellen v. Kansas City Southern R. Co., 397.
Snipes v. Southern R. Co., 649.
Sohn v. Waterson, 565.
Sonstiby v. Keeley, 495, 569, 626.
So Relle v. Western Union Tel. Co., 405.
South Branch Lumber Co. v. Ott, 539, 576.
Southern Nat. Bank v. Darling, 438.
Southern Pac. Co. v. Allen, 360.
Southern Pac. Co. v. Cavin, 311, 313.
Southern Pac. Co. v. Lipman, 374.
Southern Pac. Co. v. Robinson, 233.
Southern Pac. Co. v. Western Pac. R. Co., 578, 579.
Southern Pac. R. Co. v. Orton, 484, 558, 565.
Southern Pine Co. v. Hall, 485.
Southern R. Co. v. Decker, 386.

[The figures refer to pages]

Southern R. Co. v. McNeill, 558.
Southern R. Co. v. North Carolina Corp. Com., 466, 476.
Southern R. Co. v. Simpson, 464, 545.
Southern R. Co. v. Sittason, 667.
South Missouri Lumber Co. v. Wright, 177.
South's Heirs v. Thomas' Heirs, 182.
Sparrow v. Kohn, 381.
Speer v. Board of Com'rs of Kearney County, 485.
Speight v. People, 55.
Spicer v. Norton, 191.
Spinks v. Mutual Reserve Fund Life Ass'n, 651.
Spokane Mfg. & Lumber Co. v. McChesney, 393.
Spokane & B. C. R. Co. v. Washington & G. N. R. Co., 338.
Sprague v. Northern Pac. R. Co., 171.
Spratlin v. St. Louis Southwestern R. Co., 344.
Spratt v. Helena Power Transmission Co., 172.
Spring v. Domestic Sewing Mach. Co., 325.
Springer v. Foster, 562, 603.
Springfield v. Fulk, 395.
Spring Val. Coal Co. v. Patting, 374, 649.
Stacy v. Vermont Cent. R. Co., 266, 267.
Stadler v. First Nat. Bank, 393.
Stalker v. McDonald, 360.
Standard Implement Co. v. Parlin & Orendorff Co., 419.
Standard Sewing Mach. Co. v. Leslie, 263, 266.
Stanford v. National Drill & Mfg. Co., 378.
Stapp v. The Swallow, 580.
Starr v. Stark, 47, 175.
State v. Aiken, 200, 228.
State v. Ardoin, 337.
State v. Baer, 206.
State v. Barbour, 414.
State v. Baughman, 86.
State v. Behan, 234.
State v. Bell, 692.
State v. Blaisdell, 390.
State v. Blake, 297.
State v. Board of Com'rs of Clinton County, 692.
State v. Bristol, 197, 695.
State v. Brookhart, 44.
State v. Brooks, 281.
State v. Brown, 77, 401.
State v. Campbell, 395.
State v. Caruthers, 397.
State v. Chandler, 390.
State v. Clark, 183.
State v. Clarke, 166, 172.
State v. Cudahy Packing Co., 338.
State v. Donaldson, 54.
State v. Durham, 85.
State v. Eckenrode, 343.
State v. Ellis, 113.
State v. Fosdick, 306.
State v. Frear, 224.
State v. Fullerton, 347.
State v. Glasby, 344.
State v. Goodwin, 136.
State v. Granville Alexandrian Soc., 212.
State v. Great Northern R. Co., 177, 364.
State v. Green, 135, 300.
State v. Greensdale, 111.
State v. Griffin, 365.
State v. Guthrie, 422.
State v. Hernando Ins. Co., 365.
State v. Hill, 200.
State v. Holmes, 389.
State v. Insurance Co. of North America, 338.
State v. Intoxicating Liquors, 347, 357.
State v. Jones, 445.
State v. Judge, 295, 405.
State v. Judge of Fourth City Court, 295.
State v. Keerl, 342.
State v. Keokuk & W. R. Co., 43.
State v. Krebs, 367.
State v. Lewis, 260.
State v. Louisiana, B. G. & A. G. R. Co., 42.
State v. Louisville & N. R. Co., 337.
State v. McClung, 79.
State v. McGuire, 420.
State v. Macon, 389.
State v. Menaugh, 58.
State v. Miksicek, 354.
State v. Miles, 390.
State v. Mitchell, 54.
State v. Mortensen, 394.
State v. Muncie Pulp Co., 238.
State v. Murphy, 103.
State v. Neal, 356.
State v. Nevin, 419.
State v. Oakwood St. Ry., 695.
State v. O'Neil, 419.
State v. Passaic County Agricultural Soc., 149.
State v. Perkins, 77.
State v. Portage City Water Co., 391.
State v. Pugh, 47, 48.

[The figures refer to pages]

State v. Republican Val. R. Co., 64.
State v. Robey, 390.
State v. Rohfrischt, 177.
State v. Ross, 183.
State v. St. Johnsbury, 104.
State v. St. Paul, M. & M. R. Co., 64.
State v. Sanders, 224.
State v. Savage, 692.
State v. Scampini, 338.
State v. Schwarz, 306.
State v. Silvers, 201.
State v. Sioux City, O. & W. R. Co., 338.
State v. Smith, 177, 202, 365.
State v. Stout, 227.
State v. Sutterfield, 242.
State v. Tanner, 697.
State v. Taylor, 256.
State v. Thompson, 231.
State v. Trammel, 366.
State v. Warner, 338.
State v. Wheeler, 390.
State v. Wheeling & B. Bridge Co., 656.
State v. Whitworth, 256.
State v. Wilder, 230.
State v. Williams, 93.
State Bank, In re, 77.
State Life Ins. Co. v. Jones, 300.
State Mut. Ins. Co. v. Craig, 378.
State Nat. Bank v. Cudahy Packing Co., 628.
State Railroad Tax Cases, 561.
State Sav. Bank v. Albertson, 390.
State Trust Co. v. Kansas City, P. & G. R. Co., 470.
Staton v. Norfolk & C. R. Co., 406, 420.
Stearns v. Minnesota, 542.
Stebbins v. Guthrie, 389.
Steel v. Houghton, 118, 163.
Steele v. Charlotte, C. & A. R. Co., 178.
Steib v. Whitehead, 163.
Stein v. Morrison, 389.
Steiner v. Anderson, 281.
Stellwagen v. Wayne Probate Judge, 389.
Stephan v. Metzger, 390.
Stephens' Case, 202.
Stephenson v. Boody, 694.
Stern v. Fountain, 198.
Stevens v. Crane, 286.
Stevens v. Hauser, 145.
Stevens v. Paterson & N. R. Co., 405.
Stevens v. State, 56.
Stevenson, In re, 587.
Stewart v. Hoffman, 349.
Stewart v. Morris, 682.
Stockdale v. Onwhyn, 159.
Stockman, In re, 77.
Stockton v. Dundee Mfg. Co., 347, 690.
Stoddard v. Long Island R. Co., 371.
Stoddart v. Smith, 346, 387.
Stone, In re, 587.
Stone v. Bank of Kentucky, 607.
Stone v. Southern Illinois & M. Bridge Co., 571.
Stone v. Wisconsin, 572.
Storrie v. Cortes, 260.
Story Case, 132.
Stout v. Board of Com'rs of Grant County, 233.
Stow v. People, 177.
Stowe v. Belfast Sav. Bank, 463.
Strasburger v. Dodge, 397.
Strauss v. Merchants' Loan & Trust Co., 183.
Street v. Delta Min. Co., 350.
Strong v. Clem, 258.
Stryker v. Board of Com'rs of Grand County, 470.
Stuart v. Farmers' Bank of Cuba City, 349, 374.
Stuart v. Laird, 74.
Studebaker v. Alexander, 300.
Studebaker Bros. Co. v. Mau, 397.
Stutsman County v. Wallace, 388, 392, 479, 550.
Sudbury v. Board of Com'rs of Monroe County, 244.
Sullivan, In re, 465, 545.
Sullivan v. McMillan, 407.
Sullivan v. Mercantile Town Mut. Ins. Co., 378.
Sullivan v. Portland & K. R. Co., 515.
Sullivan-Sanford Lumber Co. v. Watson, 360.
Sumner v. Hicks, 561.
Sumner v. Sumner, 279.
Sunset Telephone & Telegraph Co. v. Pomona, 595, 606, 608.
Supervisors of Carroll County v. U. S., 486, 561.
Supreme Council of American Legion of Honor v. Green, 120, 384.
Supreme Lodge A. O. U. W. v. Hutchinson, 422.
Supreme Lodge K. of P. v. Meyer, 686.
Sutherland-Innes Co. v. Evart, 558.
Suydam v. Jenkins, 165.
Suydam v. Williamson, 479, 512.
Swarts v. Christie Grain & Stock Co., 571.
Swett v. Stark, 518.

[The figures refer to pages]

Swift v. Tyson, 369, 611, 621, 626.
Swofford Bros. Dry Goods Co. v. Mills, 389.
Sydnor v. Gascoigne, 183, 200, 217.

T

Talcott v. Pine Grove, 491, 558.
Taliaferro v. Barnett, 690.
Tally v. Ganahl, 265, 269.
Tapner v. Merlott, 93.
Taylor v. Adams Exp. Co., 668.
Taylor v. Brigham, 671.
Taylor v. Decatur Mineral & Land Co., 276, 334.
Taylor v. Holmes, 502.
Taylor v. Union Pac. R. Co., 584.
Taylor v. Ypsilanti, 502.
Tefft v. Stern, 476.
Telford v. Barney, 294.
Tennent v. Union Cent. Life Ins. Co., 398.
Tennis Bros. Co. v. Wetzel & T. R. Co., 571.
Terre Haute & I. R. Co. v. Baker, 263, 266.
Territory v. Gaines, 79.
Territory v. Hart, 114.
Tetley v. Taylor, 118, 307.
Texas & N. O. R. Co. v. Sabine Tram Co., 343.
Texas & P. R. Co. v. Cox, 600.
Texas & P. R. Co. v. Hohn, 103.
Texas & P. R. Co. v. Huber, 353.
Texas & P. R. Co. v. Humble, 391.
Texas & P. R. Co. v. Mahaffey, 230.
Thatcher v. Powell, 504, 561.
Thomas v. Blair, 183.
Thomas v. Davis, 138.
Thomas v. Doub, 268.
Thomas v. People, 408.
Thomas v. Scotland County, 456.
Thompson, In re, 330.
Thompson v. E. P. Donnell Mfg. Co., 324.
Thompson v. Fairbanks, 527.
Thompson v. Henry, 243, 696.
Thompson v. Lee County, 573.
Thompson v. McConnell, 511, 587.
Thompson v. Mylne, 414.
Thompson v. Perrine, 611.
Thompson v. Phillips, 562.
Thompson v. Searcy County, 573, 676.
Thompson, Payne & Co. v. Irwin, Allen & Co., 270.
Thoms v. Greenwood, 261.
Thomson v. Albert, 265, 269.
Thomson-Houston Electric Co. v. Holland, 333.
Thorley v. Pabst Brewing Co., 509.
Thorndike v. Milwaukee Auditorium Co., 238.
Thouvenin v. Rodrigues, 246.
Three States Lumber Co. v. Blanks, 634.
Times Pub. Co. v. Carlisle, 677.
Tinder v. Tinder, 189.
Tinsley v. Hoskins, 422.
Tioga R. Co. v. Blossburg & C. R. Co., 571, 584.
Tod v. Kentucky Union Land Co., 633.
Toher v. Crounse, 179.
Toledo Traction Co. v. Cameron, 681.
Tomes v. Barney, 480.
Tomlin v. Dubuque, B. & M. R. Co., 405.
Tomlinson v. Warner, 404.
Tompkins v. Clay St. R. Co., 404.
Toncray v. Toncray, 338.
Torpedo Co. v. Clarendon, 155.
Towle v. Forney, 186, 360, 362, 369.
Town of Bloomfield v. Charter Oak Nat. Bank, 98.
Town of Enfield v. Jordan, 478, 488, 629.
Town of Hardinsburg v. Cravens, 689, 696.
Town of Lyons v. Lyons Nat. Bank, 677.
Town of Palatine v. Kreuger, 103, 408.
Town of Pana v. Bowler, 489.
Town of Ravenswood v. Flemings, 405.
Town of Scott v. Artman, 294.
Town of South Ottawa v. Perkins, 556.
Town of Venice v. Breed, 298.
Town of Venice v. Murdock, 611, 635.
Townsend v. Jennison, 351.
Townsend v. Martin, 240.
Townsend v. Todd, 453, 454, 514, 518.
Tracy & Co., In re, 678.
Trader v. Chidester, 417, 421.
Traer v. Fowler, 177, 503.
Transfer Co. v. Kelly, 417.
Travelers' Ins. Co. v. Thorne, 635.
Travis v. Nederland Life Ins. Co., 684.
Treat v. Chicago, 589.
Treon v. Brown, 371, 613.
Trimble v. Hill, 304.
Trinity County v. McCammon, 177.
Truxton v. Fait & Slagle Co., 260.
Tullis v. Lake Erie & W. R. Co., 539, 561.

[The figures refer to pages]

Tunstall v. Christian, 149.
Turner v. Indianapolis B. & W. R. Co., 279.
Turner v. Water Co., 202.
Tyler v. Tyler, 434.

U

Ughbanks v. Armstrong, 556.
Umbreit v. American Bonding Co. of Baltimore, 348.
Underground R. R. v. New York, 558.
Union Bank of Richmond v. Board of Com'rs of Oxford, 611, 631.
Union Mortg., Banking & Trust Co. v. Hagood, 581.
Union Mut. Life Ins. Co. v. Union Mills Plaster Co., 516.
Union Nat. Bank v. Bank of Kansas City, 540.
Union Nat. Bank of Chicago v. Kansas City Bank, 459, 576.
Union Pac. R. Co. v. Mason City & Ft. D. R. Co., 47.
Union Pac. R. Co. v. Myers, 600.
Union Pac. R. Co. v. Reed, 519.
Union Pac. R. Co. v. Yates, 681.
Union R. Co. v. Chickasaw Cooperage Co., 241.
Union Trust Co. v. Rochester & P. R. Co., 676.
Union & Planters' Bank v. Memphis, 357, 591.
United Land Ass'n v. Abrahams, 337.
United Land Ass'n v. Pacific Imp. Co., 337.
United Lines Tel. Co. v. Stevens, 442.
U. S. v. Adams Exp. Co., 330.
U. S. v. Andem, 555.
U. S. v. Andersen, 568.
U. S. v. Anderson, 73.
U. S. v. Bashaw, 74.
U. S. v. Boomer, 593.
U. S. v. Brown, 678, 688.
U. S. v. Burkett, 75.
U. S. v. Burr, 605.
U. S. v. Capdevielle, 671.
U. S. v. Central Vermont R. Co., 453, 605.
U. S. v. Chicago, M. & St. P. R. Co., 509.
U. S. v. Choctaw, O. & G. R. Co., 390.
U. S. v. De Groat, 605.
U. S. v. Dunham, 682.
U. S. v. Eaton, 604.
U. S. v. Eisenbeis, 529.
U. S. v. F. A. Marsily & Co., 320.
U. S. v. Fox, 571.
U. S. v. Gilmore, 74.
U. S. v. Holt, 73.
U. S. v. Hudson, 604.
U. S. v. Hughes, 678, 687.
U. S. v. Illinois Cent. R. Co., 315.
U. S. v. Kerr, 678.
U. S. v. Kilpatrick, 678.
U. S. v. Miller, 656.
U. S. v. Missouri, K. & T. R. Co., 312.
U. S. v. Morrison, 479, 561, 574.
U. S. v. Nye, 687.
U. S. v. One Lot of Land for Bainbridge Post Office, 520.
U. S. v. Reid, 687.
U. S. v. Robeson, 600.
U. S. v. Shive, 342.
U. S. v. Stanford, 554.
U. S. v. Stone & Downer Co., 320.
U. S. v. Tanner, 74.
U. S. v. Thompson, 585.
U. S. v. Trans-Missouri Freight Ass'n, 499.
U. S. v. Tully, 602.
U. S. v. Union Pac. R. Co., 75.
U. S. v. Wotten, 74.
United States Exp. Co. v. Meints, 55.
United States Exp. Co. v. People, 352.
United States Fidelity & Guaranty Co. v. People, 389.
United States Leather Co. v. Howell, 593.
United States Min. Co. v. Lawson, 660.
United States Sav. Fund & Investment Co. v. Harris, 233.
United States Sav. & Loan Co. v. Harris, 485, 653.
United States Sav. & Loan Co. v. Miller, 250.
United States Trust Co. v. Black, 309.

V

Vail v. Territory, 192.
Van Bokelen v. Brooklyn City R. Co., 497, 512.
Van Gunden v. Virginia Coal & Iron Co., 588.
Van Loon v. Lyon, 233.
Van Matre v. Sankey, 381.
Van Rensselaer v. Kearney, 512.
Van Vleet v. Sledge, 635.
Van Winkle v. Constantine, 256.
Vattier v. Cheseldine, 295.
Vaughn v. Harp, 55.
Venner v. Atchison, T. & S. F. R. Co., 462.

Ventress v. Smith, 444.
Vere v. Cawdor, 62.
Vermont Loan & Trust Co. v. Dygert, 485.
Vick v. Gower, 127.
Vick v. Shinn, 143.
Viele v. Wells, 381.
Village of Ridgefield Park, In re, 125.
Virginia-Carolina Chemical Co. v. Kirven, 280, 570.
Virtue v. Board of Freeholders of Essex County, 228.
Vitrified Paving & Pressed Brick Co. v. Snead & Co. Iron Works, 516.
Vitzthum v. Large, 656.

W

Wabash, St. L. & P. R. Co. v. Illinois, 111.
Wade v. Travis County, 479, 481, 554.
Wade v. Walnut, 554.
Wadsworth v. Western Union Tel. Co., 405.
Wagner v. Burnham, 349.
Wagner v. Carskadon, 300.
Wagner v. Drake, 80.
Wakelee v. Davis, 281.
Walker v. Hafer, 566.
Walker v. Marks, 454.
Walker v. State Harbor Com'rs, 505.
Wallace v. Central Vt. R. Co., 134.
Walling v. Bown, 261.
Wallworth v. Holt, 148.
Walsh v. Hanan, 302.
Walsh v. New York, N. H. & H. R. Co., 603.
Walter A. Wood Co. v. Eubanks, 580.
Wamsutta Mills v. Old Colony Steamboat Co., 126.
Wanamaker v. Enterprise Mfg. Co., 327.
Wanamaker v. Poorbough, 389.
Wanamaker v. U. S., 329.
Wankowski v. Crivitz Pulp & Paper Co., 199.
Wapello State Sav. Bank v. Colton, 282.
Warburton v. White, 502, 505, 561.
Warford v. Noble, 509.
Waring v. Jackson, 561.
Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 664.
Washington, A. & Mt. V. R. Co. v. Chapman, 182.
Washington Bridge Co. v. Stewart, 266, 279.
Washington Life Ins. Co. v. Glover, 385.
Washougal & L. Transp. Co. v. Dalles, P. & A. Nav. Co., 350.
Watervale Min. Co. v. Leach, 115.
Watkins v. Crouch, 161.
Watkins v. U. S., 600.
Watson v. Lane, 381.
Watson v. Orr, 381.
Watson v. St. Louis, I. M. & S. R. Co., 46.
Watts v. Ball, 35.
Weaver v. Gardner, 195.
Webb v. Rome, W. & O. R. Co., 154.
Webb v. Rorke, 158, 159.
Webster v. American Bible Soc., 417, 422.
Weil v. Alabama State Land Co., 314.
Weiss v. Bethel, 239.
Welch v. Boston & P. R. Corp., 417.
Wellbrock v. Long Island R. Co., 303.
Welles v. Trahern, 124.
Wells v. Adams, 214.
Wells v. Clark, 602, 671.
Wells v. Garbutt, 38.
Wells v. Oregon & C. R. Co., 320.
Wells v. Western Union Tel. Co., 373.
Wells, Fargo & Co. v. Northern Pac. R. Co., 195.
Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co., 328.
Welsh v. Barber Asphalt Pav. Co., 389, 646.
West v. Cincinnati, N. O. & T. P. R. Co., 672.
West v. Paige, 438.
Westcott v. Miller, 390.
Westerly Waterworks v. Westerly, 85.
Westerman v. Cape Girardeau County, 493.
Western Inv. Co. v. Davis, 394, 397.
Western Nat. Bank v. Faber, 304.
Western Pac. R. Co. v. Southern Pac. Co., 511.
Western Roofing Co. v. South Park Baptist Church, 301.
Western Union Tel. Co. v. Burris, 642.
Western Union Tel. Co. v. Cook, 645.
Western Union Tel. Co. v. Henderson, 405.
Western Union Tel. Co. v. Hyer Bros., 69.
Western Union Tel. Co. v. Julian, 553.

[The figures refer to pages]

Western Union Tel. Co. v. McGuire, 64.
Western Union Tel. Co. v. Poe, 476, 477, 486, 625.
Western Union Tel. Co. v. Schriver, 154.
Western Union Tel. Co. v. Sklar, 643.
Western Union Tel. Co. v. Sloss, 373.
Western Union Tel. Co. v. State, 347.
Western Union Tel. Co. v. Toledo, 278.
Western Union Tel. Co. v. Wood, 642.
Westhus v. Union Trust Co. of St. Louis, 79.
Westinghouse Air-Brake Co. v. Kansas City Southern R. Co., 609.
Wheaton v. Peters, 618.
Wheeler v. Rice, 230, 295, 309.
Wheeling Bridge & Terminal R. Co. v. Reymann Brewing Co., 520.
Whitbread, Ex parte, 232.
White v. Commissioners of Multnomah Co., 115.
White v. Denman, 185, 240.
White v. Kyle's Lessee, 196.
White v. The Cynthia, 319.
White v. Wabash Western R. Co., 301.
White v. Wansey, 684.
White v. Warburton, 581.
Whitehead v. Shattuck, 662.
White Lick Quarterly Meeting of Friends, by Hadley, v. White Lick Quarterly Meeting of Friends, by Mendenhall, 75.
Whitford v. Clark County, 680, 683.
Whiting v. West Point, 135.
Whitley, Ex parte, 138.
Whitlow v. Nashville, C. & St. L. R. Co., 386.
Whitman v. Atkinson, 568.
Whitman v. Mast, Buford & Burwell Co., 382.
Whitmier & Filbrick Co. v. Buffalo, 560.
Whitney v. Fox, 392.
Whitney v. Whitney Elevator & Warehouse Co., 569.
Whittemore v. Cope, 192.
Whittle v. Jones, 274.
Wick v. The Samuel Strong, 562.
Wicomico County Com'rs v. Bancroft, 539, 590.
Wiemer v. Louisville Water Co., 464.
Wiggin v. Federal Stock & Grain Co., 282.
Wiggins Ferry Co. v. Chicago & A. R. Co., 385.
Wilcox v. People, 343.
Wilkins v. Chicago, St. L. & N. O. R. Co., 241.
Wilkins v. Philips, 386.
Wilkinson v. Atkinson, 109.
Wilkinson v. Heavenrich, 427.
Willard v. Albertson, 300.
Willard v. Serpell, 569.
Willets v. Ridgway, 54.
William Cramp & Sons Co. v. U. S., 312.
William Fox Amusement Co. v. McClellan, 304.
Williams v. Bosson, 210.
Williams v. Chicago, R. I. & P. R. Co., 384.
Williams v. Eggleston, 466.
Williams v. Gaylord, 572.
Williams v. Germaine, 109.
Williams v. Gibbs, 453.
Williams v. Gold Hill Min. Co., 514.
Williams v. Keith, 302.
Williams v. Kirtland, 504, 512.
Williams v. McFadden, 180.
Williams v. Miles, 58, 285.
Williams v. Stearns, 558.
Williams v. Suffolk Ins. Co., 627.
Williams v. Talladega, 337.
Williamson v. Berry, 505.
Williamson v. Suydem, 504.
Willis v. Board of Com'rs of Wyandotte County, 611, 631.
Willis v. Eastern Trust & Banking Co., 396.
Willis v. Moore, 409.
Willis v. Owen, 225, 228.
Willson v. Binford, 263, 268.
Wilson, Appeal of, 36, 70.
Wilson v. Beckwith, 242, 253.
Wilson v. McMath, 157.
Wilson v. Neal, 562.
Wilson v. North Carolina, 568.
Wilson v. Perrin, 526.
Wilson v. Perry, 250.
Wilson v. Smith, 585.
Wilson v. Ulysses Tp., 59.
Wilson v. Wall, 74.
Wilson v. Ward Lumber Co., 481
Wilson v. White, 408.
Windham v. Chetwynd, 233.
Windle v. Bonebrake, 417, 421.
Windsor Sav. Bank v. McMahon, 628, 631.
Winnebago, The, 550.
Winona & St. P. Land Co. v. Minnesota, 589.
Winona & St. P. R. Co. v. Plainview, 385.
Wisconsin v. Pelican Ins. Co., 456.

[The figures refer to pages]

Wiseman v. Beckwith, 256.
Wisner, In re, 390.
Withaup v. U. S., 678, 687, 688.
Witters v. Sowles, 686.
Woldson v. Larson, 643.
Wo Lee, In re, 596.
Wolf v. Lowry, 231, 233.
Wood, In re, 587.
Wood v. Hammond, 108, 406.
Wood v. New York, 235.
Wood v. State, 103, 408.
Woodburn, Ex parte, 200.
Woodruff, In re, 166, 181.
Woodruff v. Woodruff, 697.
Woodward v. Jewell, 314.
Woolley v. Lyon, 421.
Woolsey v. Cade, 236.
Woolsey v. Dodge, 562.
Woolsey v. Judd, 92.
Wooster v. Handy, 271.
Wooster v. Hill, 685.
Wooters v. Hollingsworth, 298.
Worswick Mfg. Co. v. Philadelphia, 324.
Worthington v. Hiss, 268.
Wren v. Dooley, 435.
Wright v. Adams Exp. Co., 369.
Wright v. Bales, 682.
Wright v. Columbus, H. V. & A. R. Co., 311.
Wright v. Hooker, 55.
Wright v. Nagle, 49, 607.
Wright v. Sill, 182.
Wright v. Southern R. Co., 649.
Wright v. Susquehanna Mut. Fire Ins. Co., 143.
Wright v. Taylor, 681.
Wuppermann v. The Carib Prince, 317.
W. W. Cargill Co. v. Minnesota, 552.
Wyatt v. State Board of Equalization, 50.
Wyoming Coal Min. Co. v. State, 392.

Y

Yankton Sav. Bank v. Gutterson, 390.
Yarrington v. Delaware & H. Co., 562.
Yazoo & M. V. R. Co. v. Adams, 248, 249, 539, 699.
Yeates v. Illinois Cent. R. Co., 640.
Yeatman v. Yeatman, 99.
Yocum v. Parker, 480.
Yolo County v. Barney, 163.
York, Appeal of, 256.
York v. Conde, 348.
York v. Washburn, 508.
Young v. Downey, 254.
Young v. State Bank of Marshall, 48.
Young v. Templeton, 430.
Young v. Western Union Tel. Co., 405.

Z

Zacher v. Fidelity Trust & Safety-Vault Co., 528.
Zane v. Hamilton County, 492.
Zeiger v. Pennsylvania R. Co., 544, 563.
Zeikus v. Florida E. C. R. Co., 381.
Zinsser v. Krueger, 196.
Zufall v. U. S., 397.
Zug, In re, 505.

INDEX

[THE FIGURES REFER TO PAGES]

A

ABATEMENT, PLEA IN,
Decision on, as the "law of the case," 278.

ACKNOWLEDGMENT OF DEEDS,
Federal courts follow state decisions as to, 518.

ACTS OF CONGRESS,
Maxim of stare decisis applied to decisions construing, 231.
State courts bound by federal decisions on validity and construction of, 347.
Construction of, by federal courts, not governed by state decisions, 597.
Conformity act of 1872, 665.

ADMIRALTY LAW,
Federal courts administering, not bound by state decisions, 663.

ADOPTED STATUTES,
From another state, local construction followed, 388.
From Great Britian, English construction followed, 433.

ADVERSE POSSESSION,
Federal courts follow state decisions as to, 519.

ADVISORY OPINIONS,
Of courts, when authoritative as precedents, 88.

ALL FOURS,
Meaning of the term, 61.

AMICABLE ACTIONS,
Decisions in, as precedents, 85.
In state courts, obligation of federal courts to follow decision in, 467.

ANALOGY,
As basis of argument and decision in law, 63.
Necessary caution in use of, 66.
False, arguing from, 67.

ANCIENT DECISIONS,
Authority of, as precedents, 95.
Obsolete, departure from, 146.

[The figures refer to pages]

ANONYMOUS DECISIONS,
Authority of, as precedents, 129.

APPEAL,
Pending, effect on value of decision as precedent, 137.
Decision on former, as "law of the case," 262.
Further proceedings in appellate court, 266.
Subsequent proceedings in trial court, 271.
Effect of new facts or new parties, 286.

APPELLATE COURTS,
Of intermediate jurisdiction, bound by decisions of supreme court, 299, 300.
See, also, Supreme Court of State; Supreme Court of United States.

APPELLATE DIVISION,
In New York, following decisions of Court of Appeals, 301.

ARGUMENT OF COUNSEL,
As affecting value of decision as precedent, 107.
As test between decision and dictum, 171.

ASSIGNMENTS FOR CREDITORS,
Federal courts follow state decisions as to, 576.

ATTACHMENT,
Federal courts follow state decisions construing laws relating to, 573.

AUTHORITIES,
Citation of, in opinions, as affecting force of precedents, 126.
Obsolete or inapplicable, disregard of, 146.
Absence of, deciding case on principle, 152.
See, also, Precedents.

B

BANKRUPTCY ACT,
Construction of, by federal courts binding on state courts, 349.
Federal courts not bound by state decisions on, 598.

BANKS,
Construction of national bank act by federal courts binding on state courts, 350.

BIAS,
Of judge as affecting force of decision as precedent, 116.

BILLS AND NOTES,
State decisions on law of, not binding in federal courts, 626.

BONDS,
Decisions on validity of, as rules of property, 242.
Conflicting state and federal decisions, 488, 548.

C

CARRIERS,
Construction of state laws regulating, followed by federal courts, 582.

CHANCERY,
See Equity.

CHATTELS,
State decisions as to transfer and incumbrance of, followed in federal courts, 525.

CHURCH COURTS,
Decisions of, as precedents in civil courts, 72.

CIRCUIT COURT OF APPEALS, FEDERAL,
Bound by decisions of Supreme Court of U. S., 311, 312.
In different circuits, comity between, 319.
Special rule in patent cases, 323.
Special rule in tariff cases, 328.
Decisions of, in inferior courts of same circuit, 329.
In inferior courts in other circuits, 333.

CITATION OF AUTHORITIES,
In opinion, as affecting force of decision as precedent, 126.

CIVIL LAW,
Doctrine of precedents in, 21.

COLOR OF TITLE,
Federal courts follow state decisions as to, 519.

COMBINING CASES,
Deduction of rules of law by means of, 63.

COMITY,
In relation to following precedents, 11.
Between associate judges of same court, 274.
Between state courts of co-ordinate jurisdiction, 306.
Between federal courts of equal rank, 319.
Special rule in patent cases, 323.
Special rule in tariff cases, 328.
As between different judges of same court, 334.
As basis of adopting local construction of foreign statute, 384.
Principle of, as basis for following English decisions, 430.
Federal courts following decisions of local state courts, 455.

COMMERCE,
Foreign and interstate, decisions of federal courts on, binding on state courts, 342.

COMMERCIAL LAW,
Decisions on, as rules of property, 242.
Federal decisions on, as authorities in state courts, 368.

[The figures refer to pages]

COMMERCIAL LAW—Cont'd.
State decisions on, not binding in federal courts, 611.
General principle, 611.
Negotiable instruments, 626.
Commercial contracts and transactions, 626.
General or common law, 631.
Validity and construction of coptracts, 635.
Liability for torts, 639.
Law of master and servant, 645.

COMMISSIONERS,
Of supreme court, decisions of, as precedents, 297.

COMMON LAW,
Federal decisions on questions of, not binding on state courts, 359.
Decisions in other states as authorities on, 400.
Value of English decisions as precedents on, 428.
State decisions on, not binding in federal courts, 631.

CONDEMNATION PROCEEDINGS,
Decisions on, as rules of property, 241.
Federal courts follow state decisions as to, 512, 574.

CONFLICT OF LAWS,
Decisions of foreign countries as evidence of local law, 447.
State decisions on, not binding in federal courts, 653.

CONFLICTING DECISIONS,
Application of rule of stare decisis in case of, 220.
Between different judges of same court, 274.
Of supreme court, duty of inferior courts as to, 297.
Duty of intermediate appellate courts, 302.
Of U. S. Supreme Court, duty of lower federal courts as to, 314.
As to construction of foreign statute, 383.
Of other states, which preferred and followed, 416.
Of federal and state courts, duty of federal courts as to following, 474–492.

CONGRESS, ACTS OF,
See Acts of Congress; Statutes.

CONSENT DECREES,
Effect as precedents, 83.

CONSTITUTIONAL LAW,
Provisions requiring courts to file written opinions, 54.
Stare decisis applied to decisions on, 222–236.
Construction and interpretation of constitutions, 222.
Decisions on constitutionality of statutes, 226.
Constitutionality of statute of another state, local decisions followed, 386.

[The figures refer to pages]

CONSTITUTIONAL LAW—Cont'd.
State decisions on constitutionality of state statute, when followed by federal court, 556.
Determination of federal questions by federal courts, 594.

CONSTITUTIONS,
Construction of, application of rule of stare decisis to, 222.
Of state, construction of by U. S. Supreme Court, duty of inferior federal courts to follow, 318.
Federal, construction by U. S. Supreme Court binding on state courts, 336.
Of another state, local construction of, followed, 386.
Of states, construction of, by state courts, followed by federal courts, 552.

CONSTRUCTION OF STATUTES,
By legislature and executive officers, as precedents for courts, 72.
Maxim of stare decisis applied to, 231.
Re-enacted statutes, 235.
As establishing rules of property, 245.
Of state, by U. S. Supreme Court, inferior federal courts will follow, 318.
Federal, by federal courts, binding on state courts, 347.
Of state statutes by federal courts, 364.
Of another state, local decisions followed as precedents, 380.
Statutes adopted from another state, 388.
Adopted from Great Britain, local construction followed, 433.
By federal court in absence of state decisions, 473.
Of states, by state courts, followed by federal courts, 569.
Federal, U. S. courts not bound to follow state decisions on, 597.

CONTRACTS,
Decisions as to, as constituting rules of property, 242.
Made in another state, local decisions applicable to, 397.
Conflicting federal and state decisions as to, duty of federal courts as to following, 484, 606.
State decisions on construction and nature of, bind federal courts, 524.
Exception as to mercantile contracts, 626.
Exception as to questions of general law, 635.
Exception as to maritime contracts, 663.
Effect on, of overruling prior decisions, 693.

CONTRACTS, LAWS IMPAIRING OBLIGATION OF,
Decisions of federal courts as to, binding on state courts, 344.
Decisions of state courts when followed by federal courts, 605.

CONTRIBUTORY NEGLIGENCE,
State decisions on, not binding on federal courts, 641.

[The figures refer to pages]

CONVEYANCES,
Decisions on execution and recording of, as rules of property, 239.
By state courts bind federal courts, 518, 579.
Fraudulent, state decisions as to, followed by federal courts, 580.

CO-ORDINATE COURTS,
Decisions of, as precedents, 117.
Of state system, following decisions of, 306.
Federal, comity as to following decisions of, 319.
Special rule in patent cases, 323.
Special rule in tariff cases, 328.
Rulings of different judges in same court, 334.

CORPORATIONS,
Of another state, local decisions followed as to, 397.
Federal courts follow state decisions as to, 530, 570.
Federal, state decisions on, do not bind federal courts, 600.

COUR DE CASSATION,
Decisions of, as precedents, 22.

COURT OF APPEALS,
As an intermediate court, bound by decisions of supreme court, 300.

COURT OF CIVIL APPEALS,
In Texas, bound by decisions of supreme court, 301.

COURT OF CLAIMS,
Bound by decisions of U. S. Supreme Court, 312.

COURT OF CRIMINAL APPEALS,
In Texas, authority of decisions of, as respects supreme court, 302.

COURTS,
Of religious bodies, decisions, of, as precedents, 72.
Varying rank and reputation of, as affecting value of their decisions, 112.
Co-ordinate, decisions of, as precedents, 117, 306.
Inferior, value of decisions of, 118.
Maxim of stare decisis applied to, 182.
Decision must be by court of last resort, 186.
Effect of change in composition or organization of, 189.
Authority and discretion as to overruling decisions, 204.
Bound by former decision as "law of the case," 262.
Further proceedings in appellate court, 266.
Subsequent proceedings in trial court, 271.
Proceedings before different judge, 274.
Effect of removal to federal court, 289.
Of same state, authority of precedents as between, 294.
Supreme court and inferior courts, 294.

COURTS—Cont'd.
Supreme court and intermediate appellate courts, 299.
Intermediate and inferior courts, 303.
Chancery courts, 305.
Courts of co-ordinate jurisdiction, 306.
General and special terms, 308.
Of United States, authority of precedents as between, see Federal Courts.
Of states, authority of federal decisions in, 336.
Territorial, following decisions of federal courts, 377.
Of other states, decisions of, as precedents, 380–427.
Inferior courts of other states, 410.
Of United States, following decisions of state courts, see Federal Courts.
See, also, in general, Federal Courts, State Courts, and various particular courts by name.

CRIMINAL LAW,
When federal courts follow state decisions as to, 566.
Not as to federal criminal law, 604.
Not as to evidence in criminal cases, 686.
Not as to practice in criminal cases, 678.

CRITICISING CASES,
Rules and principles for, 80–138.
Effect of criticism on force of precedent, 99.
Adverse criticism as ground for overruling, 207.

CUSTOMS DUTIES,
See Tariff Cases.

D

DAMAGES,
Measure of, state decisions not binding on federal courts, 643.

DECISIONS,
Distinguished from opinions, 38.
Interpretation and limitation of, 49.
Of special tribunals and quasi-judicial bodies as precedents, 72.
Reports of, 138.
By equally divided court, no precedent, 76.
Obsolete or locally inapplicable, 146.
Absence of, decision of case on principle, 152.
Distinguished from dicta, 166–169, 171–174.
General rule of adherence to, see Stare Decisis.
Reasons for overruling, see Overruling Cases.
Establishing rules of property, 237–260.
Constituting "law of the case," 262.
Requisites and essentials of, 277.
Authority of, as between various courts of same state, 294.
Authority of, as between various federal courts, 311.

[The figures refer to pages]

DECISIONS—Cont'd.
Of federal courts as authority in state courts, 336.
Interpretation and application of, 354.
Of other states, value and effect as precedents, 380–427.
Of English courts, value as precedents in America, 428–451.
Of state courts, as precedents in federal courts, see Federal Courts.
Reversal or overruling of, effect of, 689.
See, also, in general, Dicta; Opinions; Precedents.

DECLARATORY PRECEDENTS,
Defined, 9.

DEDICATION OF LANDS,
Decisions on, as rules of property, 241.

DEEDS,
Decisions on execution and recording of, as rules of property, 239.
Federal courts follow state decisions as to, 518, 579.

DEMURRER,
Decision on, as "law of the case," 280.

DESCENT,
Decisions as to, establishing rules of property, 243.
Federal courts follow state decisions as to, 523.

DICTA,
Definition, criteria, and want of authority of, 166–181.
Nature and varieties of, 166.
Obiter dicta, 167.
Dicta propria, 167.
Gratis dicta, 168.
Examples of, 170.
Argument and consideration of case as affecting nature of decision, 171.
Decision rested on other grounds, 174.
Dicta not binding as precedents, 176.
Duty of inferior courts, 179.
Value as persuasive arguments, 179.
Rulings in anticipation of new trial, 180.
Do not constitute "law of the case," 283.
Of U. S. Supreme Court, effect of, in lower federal courts, 314.
Of courts of another state as evidence of its local law, 400.
Of state courts do not bind federal courts, 464.

DISSENTING OPINIONS,
Force and value of, 130.
Effect of, on decision as a precedent, 131.

DISTINGUISHING CASES,
Process and method of, 60.
As a means to avoid overruling, 188.

[The figures refer to pages]

DISTRICT OF COLUMBIA,
Courts of, bound by decisions of U. S. Supreme Court, 312.
Applicability of Maryland decisions in, 547.

DIVIDED COURT,
Effect of equal division on authority of decision, 76.
Judgment by, as authority, 131.
As reason for overruling decision, 207.

DOMESTIC RELATIONS,
Federal courts follow state decisions as to, 535.

DUE PROCESS OF LAW,
Decisions of federal courts as to, binding on state courts, 345.
State decisions as to, do not bind federal courts, 609.

E

ECCLESIASTICAL COURTS,
Judgments of, as precedents in civil cases, 72.
English, decisions of, as precedents in America, 439.

EMINENT DOMAIN,
Decisions on, as establishing rules of property, 241.
Federal courts follow state decisions as to, 512.

EMPLOYERS' LIABILITY ACTS,
Of states, construction by state courts followed by federal courts, 592.

ENGLISH DECISIONS,
Value and effect of, as precedents, 428–451.
Decisions on the common law, 428.
General rule, 428.
Principle of comity, 430.
Weighing and criticising authorities, 430.
Overruled cases, 431.
Statutes forbidding citation of English cases, 432.
Construction of adopted British statutes, 433.
English equity cases, 436.
English ecclesiastical cases, 439.
English precedents in novel and unsettled cases, 440.
Decisions locally inapplicable rejected, 151, 443.

EQUITY,
Doctrine of precedents in, 30.
Courts of, bound by decisions of supreme court, 305.
English decisions in, as precedents, 436.
Equity cases in federal courts not governed by state decisions, 655.
Equity jurisprudence in general, 655.
Equity jurisdiction under state statutes, 659.
Distinction between law and equity preserved, 662.

[The figures refer to pages]

ERROR,
In decision, manifest, as ground for overruling, 199.
Not ground for overruling decisions constituting rules of property, 255.

ERROR, WRIT OF,
Decision on former, as "law of the case," 262.
Further proceedings in appellate court, 266.
Subsequent proceedings in trial court, 271.
Effect of new facts or new parties, 286.

EVIDENCE,
Decisions on matters of, value as precedents, 198.
Federal courts conforming to state rules of, 679.
General rule, 679.
Regulation by act of Congress, 679.
Regulation by state statute, 680.
Common-law rules, 681.
Competency of witnesses, 682.
In criminal cases, 686.

EXECUTION LAWS,
Federal courts follow state courts on construction of, 573.

EXECUTIVE OFFICERS,
Practical construction of statute by, as precedent for courts, 72.
Title and rights of, decisions on, as rules of property, 244.

EXEMPTION LAWS,
Of state, federal courts follow state decisions construing, 511, 586.

EX PARTE DECISIONS,
Value of, as precedents, 83.

EXTRADITION,
Foreign and interstate, federal decisions as to, binding on state courts, 350.

F

FACTS,
Decisions on, value as precedents, 198.
New, as affecting application of "law of the case," 286.
Decisions of state courts on, not binding on federal courts, 463.

FEDERAL COURTS,
Removal of causes to, application of "law of the case," 289.
Authority of precedents as between various, 311.
Decisions of Supreme Court, 311.
General rule, 311.
What courts are bound, 312.
What questions concluded, 313.
Conflicting authority elsewhere, 313.
Dicta and conflicting decisions, 314.

FEDERAL COURTS—Cont'd.
Decisions of inferior courts as precedents in Supreme Court, 316.
Construction of state constitutions and statutes, 318.
Comity between co-ordinate courts, 319.
Special rule in patent cases, 323.
Special rule in tariff cases, 328.
Circuit court of appeals and inferior courts of same circuit, 329.
Circuit court of appeals and inferior courts in other circuits, 333.
As between different judges in same court, 334.
Decisions of, as authorities in state courts, 336.
Federal questions in general, 336.
Decisions of U. S. Supreme Court, 336.
Scope and Applications of rule, 341.
Foreign and interstate commerce, 342.
Obligation of contracts, 344.
Due process of law, 345.
Judgments from other states, 345.
Where no decision by U. S. Supreme Court, 346.
Validity and construction of acts of Congress, 347.
Jurisdiction and powers of federal courts, 352.
Interpretation and application of federal decisions, 354.
Questions of general jurisprudence or local law, 359.
Validity and construction of state statutes, 364.
Commercial law, 368.
Decisions of inferior federal courts, 372.
Rule for inferior state courts, 374.
Rule for territorial courts, 377.
Following decisions of local state courts, 452.
General principles, 452.
Application of rule of comity, 455.
Principle of giving "full faith and credit," 456.
Decisions of territorial courts, 457.
Varying decisions in different states, 458.
What decisions controlling, 460.
Must be decision of highest court, 461.
Conclusiveness of decision, 461.
Decision establishing local law of state, 462.
Where no question of law decided, 463.
Exclusion of dicta, 464.
Single or multiple decisions, 465.
Majority opinions, 465.
Fictitious or test cases, 467.
Rulings of intermediate and inferior courts, 469.
Absence of decision by state court, 471.
Postponing decision to await ruling of state court, 473.
Adjudging validity or construction of statutes, 473.

[The figures refer to pages]

FEDERAL COURTS—Cont'd.
Conflicting prior federal decision and subsequent state decision, 474.
Inconsistent or fluctuating state decisions, 478.
Decisions upon vested rights or contracts, 484.
Decisions on validity of municipal bonds, 488.
Conflicting state and federal decisions, 492.
Duty of inferior federal courts, 492.
Following state decisions on matters of local law and rules of property, 496.
General rule, 496.
Questions of public policy, 499.
Rules of property in general, 502.
Law of real property, 504.
Mortgages, foreclosure, and redemption, 513, 580.
Acknowledgment and record of deeds, 518.
Adverse possession and color of title, 519.
Construction of wills, 521, 580.
Descent and distribution of estates, 523, 580.
Nature and effect of contracts, 524.
Transfer and incumbrance of chattels, 525.
Liens, 528, 580.
Law of corporations, 530, 570.
Rights and liabilities of municipal corporations, 532, 573.
Domestic relations, 535.
Interest and usury, 536, 581.
Following state decisions as to constitution and statutes, 538.
General rule, 538.
Requisites of decision to be followed, 543.
Federal questions excluded, 549.
Construction of state constitution, 552.
Enactment and repeal of statutes, 554.
Constitutionality of statutes, 556.
Statutory construction in general, 569.
State laws extended over territories, 563.
Statute of frauds, 565.
Criminal laws, 566.
Jurisdiction and procedure, 567.
Remedies and defenses, 567.
Law of private corporations, 570.
Municipal corporations, 573.
Execution and attachment laws, 573.
Condemnation proceedings, 574.
Insolvency and assignments for creditors, 576.
Insurance contracts, 577.
Public lands and grants, 578.
Estates and conveyances, 579.
Mortgages and liens, 580.

[The figures refer to pages]

FEDERAL COURTS—Cont'd.
Fraudulent conveyances, 580.
Wills and administration, 580.
Interest and usury, 581.
Sunday laws, 582.
Regulation of carriers, 582.
Statutes of limitations, 583.
Exemption laws, 586.
Revenue and tax laws, 587.
Employers' liability laws, 592.
Decision of federal questions in, not governed by state decisions, 594–610.
Not bound by state decisions on questions of commercial law or general jurisprudence, 611–654.
General rule, 611.
Commercial law, 626.
General or common law, 631.
Validity and construction of contracts, 635.
Liability for negligence and other torts, 639.
Law of master and servant, 645.
Fellow-servant rule, 648.
Public policy, 650.
International law, 651.
Conflict of laws, 653.
Not bound by state decisions in equity and admiralty cases, 655.
Conforming to state rules of pleading and practice, 665.

FEDERAL QUESTIONS,
Decisions of federal courts on, binding on state courts, 336.
Arising on construction of state statute, decisions do not bind federal courts, 549.
Decision of, in federal courts, not governed by state decisions, 594–610.
General rule, 594.
Construction of acts of Congress, 597.
Construction of bankruptcy law, 598.
Rights and powers of federal corporations, 600.
Jurisdiction and powers of federal courts, 601.
Federal criminal law, 604.
Obligation of contracts, 605.
Due process of law, 609.
Process and jurisdiction of federal courts, 671.
Authority and discretion of judges, 676.
Federal criminal law, 604, 678, 686.

FELLOW SERVANTS,
Construction of statutes relating to, by state courts, followed by federal courts, 592.
Non-statutory law of, decided independently by federal courts, 648.

[The figures refer to pages]

FIRST IMPRESSION,
Decisions in cases of, value as precedents, 91.
Decision of cases of, on principle, 159.
On precedents from other states, 403.
On decisions of English courts, 440.

FIXTURES,
Federal courts follow state decisions as to, 511.

FORECLOSURE,
Federal courts follow state decisions as to, 513.

FOREIGN COURTS,
Value and effect of precedents from other states, 380.
Decisions in foreign countries as precedents, 428–451.
English decisions on the common law, 428.
Adopted British statutes, 433.
English equity cases, 436.
English ecclesiastical cases, 439.
English precedents in novel and unsettled cases, 440.
English decisions locally inapplicable, 443.
Decisions of other foreign countries, 447.

FRAUDULENT CONVEYANCES,
Federal courts follow state decisions as to, 580.

FRENCH LAW,
Doctrine of precedents in, 21–24.
Decisions of French courts cited in Louisiana, 451.

FULL FAITH AND CREDIT,
To judgments of other states, federal decisions on, binding on state courts, 345.
As basis for adopting local construction of local statute, 384.
As requiring federal courts to follow decisions of state courts, 456.

G

GENERAL CURRENT OF AUTHORITY,
Overruling decisions contrary to, 209.
Conforming decisions to, 413.

GENERAL JURISPRUDENCE,
Decisions of federal courts on, as authority in state courts, 359.
Decisions from other state as authority on, 400.
State decisions on, not binding in federal courts, 611.
Commercial contracts and transactions, 626.
General or common law, 631.
Validity and construction of contracts, 635.
Liability for torts, 639.
Law of master and servant, 645.
Fellow-servant rule, 648.

GENERAL JURISPRUDENCE—Cont'd.
Questions of public policy, 650.
International law, 651.
Conflict of laws, 653.

GENERAL LAND OFFICE,
Federal, decisions of, as precedents, 72.

GENERAL TERM,
Of court, decisions binding on special term, 308.

GERMAN LAW,
Doctrine of precedents in, 21–24.

GRATIS DICTA,
Defined and explained, 168.
And see, generally, Dicta.

GUARDIAN AND WARD,
Federal courts follow state decisions on law of, 535.

H

HUSBAND AND WIFE,
Federal courts follow state decisions on law of, 535.

HYPOTHETICAL CASES,
Decisions in, as precedents, 85.
Decisions of state courts in, duty of federal courts to follow, 467.

I

INCONVENIENCE,
Argument from, as affecting decision of novel cases, 163.
Hardship as ground for disregarding former decisions, 212.

INFERIOR COURTS,
Decisions of, as precedents, in general, 118.
Duty of, with regard to dicta of superior courts, 179.
Decisions of, do not establish rules of property, 247.
Bound by former decision as "law of the case," 271.
Of state, bound by decisions of supreme court, 294.
Decisions of supreme court commissioners, 297.
Decisions of intermediate appellate courts, 303.
Of co-ordinate jurisdiction, decisions as precedents, 306.
General and special terms, 308.
Federal, bound by decisions of supreme court, 311.
Rulings of, as precedents in supreme court, 316.
Comity between, 319.
Following decisions of circuit court of appeals, 329.
In same circuit, 329.
In other circuits, 333.
Rulings of different judges of same court, 334.

[The figures refer to pages]

INFERIOR COURTS—Cont'd.
Federal, authority of decisions of, in state courts, 372.
Of states, duty as to following federal or state decisions, 374.
Of other states, decisions of, as precedents, 410.
Of states, decisions not binding on federal courts, 469.

INSOLVENCY LAWS,
Construction of, by state courts, followed by federal courts, 576.

INSURANCE,
Federal courts follow state decisions as to, 577.
Exception as to marine insurance, 663.

INTEREST AND USURY,
Federal courts follow state decisions as to, 536, 581.

INTERLOCUTORY DECISIONS,
As precedents, 83.
As constituting "law of the case," 277.

INTERMEDIATE APPELLATE COURTS,
Doctrine of "law of the case" in, 269.
Bound by decisions of supreme court, 299.
In case of conflicting decisions, 302.
Decisions of, binding on inferior courts, 303.
Of states, authority of decisions of, in federal courts, 469.
Of United States, see Federal Courts.

INTERNATIONAL LAW,
State decisions on, not binding in federal courts, 651.

INTERPRETATION,
Of judicial decisions, 49.
Discrimination of dicta, 166.
Of constitutions and statutes, rule of stare decisis applied to, 222–236.
By U. S. supreme court, inferior federal courts will follow, 318.
Of federal decisions by state courts, 354.
Of federal constitution by federal courts, binding on state courts, 336.
Of state statutes by federal courts, 364.
Of statutes of another state, local decisions followed, 380.
Statute adopted from another state, 388.
Of adopted British statutes, English decisions followed, 433.

INTERSTATE COMMERCE,
Decisions of federal courts on, binding on state courts, 342.

INTERSTATE COMMERCE ACT,
English decisions as authorities on construction of, 435.

INTERSTATE LAW,
Federal decisions on, binding in state courts, 336.
Interstate commerce, 342.

INTERSTATE LAW—Cont'd.
Judgments from other states, 345.
Interstate extradition, 350.
Decisions of other states as precedents, 380–427.

ISOLATED CASES,
Value of, as precedents, 90.
More easily overruled, 206.

J

JUDGES,
Rank and reputation of, as affecting force of precedents, 112.
Absence or non-participation of, affecting force of decision, 134.
Concurrence in result, effect on decision, 135.
Dicta in opinions of, 166–168.
Change of, as affecting stability of former decisions, 189.
Authority and discretion of, as to overruling decisions, 204.
Of same court, when bound by each other's decisions, 274.
Of co-ordinate state courts, following decisions of, 306.
Of federal courts of equal rank, following decisions of, 319.
Different rulings by judges of same court, 334.
Federal, authority and discretion of, a federal question, 676.

JUDGMENTS,
From other states, federal decisions as to giving full faith and credit to, binding on state courts, 345.
Effect on, of reversal or overruling of prior decisions, 700.

JUDICIAL SALES,
Decisions on, as rules of property, 240.
Federal courts follow state decisions as to, 511.

JURISDICTION,
Decisions on questions of, as precedents, 82.
As constituting "law of the case," 278.
Of United States courts, state courts bound by federal decisions on, 352.
Statutory, decisions of state courts on, followed by federal courts, 567.
Of federal courts, state decisions on, do not bind federal courts, 601.
Decided independently by federal courts, 671.

L

LAND,
Decisions on title to, as rules of property, 237.
Federal courts follow state decisions as to, 504, 579.

LAND LAWS,
Of United States, construction of, by federal courts binding on state courts, 349.

[The figures refer to pages]

LANDLORD AND TENANT,
Federal courts follow state decisions as to, 508.

LAND OFFICE,
Federal, decisions of, as precedents, 72.

LAW MERCHANT,
See Commercial Law.

LAW OF THE CASE,
Former decisions as, general principle, 262.
Distinguished from stare decisis and res judicata, 264.
Further proceedings in appellate court, 266.
Rule in intermediate appellate courts, 269.
Decisions on pleading and practice, 270.
Subsequent proceedings in trial court, 271.
Proceedings before different judge, 274.
Essentials of decision to constitute, 277.
Decisions on questions of jurisdiction, 278.
Rulings on motions and demurrers, 280.
What points or matters concluded, 283.
Obiter dicta excluded, 283.
Effect of introducing new facts or parties, 286.
Application of rule on removal of cause to federal court, 289.
Not affected by overruling of decision, 691.

LEADING CASES,
Defined, 95.
Special reasons for authority of, 95.

LEASES,
Federal courts follow state decisions as to, 508.

LEGAL-TENDER ACTS,
Construction of, by federal courts binding on state courts, 351.

LEGISLATURE,
Power of, to require courts to file written opinions, 54.
Construction of statute by, as precedent for courts, 72.

LIENS,
Decisions on, as establishing rules of property, 239, 240, 242.
Federal courts follow state decisions on, 528, 580.
Exception as to maritime liens, 663.
Effect on, of overruling prior decisions, 693.

LOCAL LAW,
Decisions of federal courts on, as authority in state courts, 359.
Of another state, local decisions on, followed, 396.
Federal courts follow state decisions as to, 496.
Construction of state constitution and laws, 538.

M

MARITIME LAW,
Federal courts not bound by state decisions on, 663.
MARKETS OVERT,
Rejection in America of English precedents as to, 444.
MARRIAGE,
Federal courts follow state decisions on law of, 535.
MASTER AND SERVANT,
When federal courts follow state decisions on law of, 535.
Non-statutory or general law, 645.
MERCANTILE LAW,
See Commercial Law.
MORTGAGES,
Decisions on validity, execution, and recording of, as rules of property, 237, 239, 242.
Federal courts follow state decisions as to, 513, 580.
Chattel mortgages, 525.
MOTION,
Decision on, as "law of the case," 280.
MUNICIPAL CORPORATIONS,
Bonds of, conflicting state and federal decisions on validity of, 488.
Federal courts follow state decisions as to rights and duties of, 532, 573.
Liability for negligence or torts, 641.
MUNICIPAL ORDINANCES,
State decisions on validity of, when followed by federal courts, 560.

N

NAVIGABLE WATERS,
Rejection in America of English doctrine of, 444.
NAVIGATION LAWS,
Decisions on, by federal courts, binding on state courts, 351.
NEGLIGENCE,
State decisions on general law of, not binding in federal courts, 639.
General rule, 639.
Negligence of agents, servants, and lessees, 640.
Imputed negligence, 641.
Negligence of municipal corporations, 641.
Contributory negligence, 641.
Negligence of telegraph companies, 642.

[The figures refer to pages]

NEGLIGENCE—Cont'd.
Measure of damages, 643.
Exemption from liability, 643.

NEGOTIABLE INSTRUMENTS,
State decisions on, not binding in federal courts, 626.

NEWSPAPER REPORTS,
Rarely admissible in courts, 144.
Reasons for want of authority, 144.

NEW TRIAL,
Rulings made in anticipation of, as decisions or dicta, 180.
Former decision as "law of the case" on, 262, 271.

NISI PRIUS DECISIONS,
Rank and value of, as precedents, 112, 118.
Of state courts, authority of, in federal courts, 469.

NOVEL CASES,
Value of, as precedents, 90.
Rules for decision of, 152–165.
English decisions as guides for decision of, 440.

O

OBITER DICTA,
Defined and explained, 167.
See, generally, Dicta.

OBLIGATION OF CONTRACTS,
Decisions of federal courts as to, binding on state courts, 344.
State decisions on, when followed in federal courts, 605.
Effect on, of overruling prior decisions, 693.

OBSOLETE CASES,
Loss of authority as precedents, 96, 146.

OPINION OF COURT,
Decision distinguished from, 38.
Interpretation and limitation of, 49.
Preparation and filing, constitutional provisions as to, 54.
Legislative requirements, 54.
Judicial practice, 56.
Decision without opinion as precedent, 56.
Written opinion as evidence of decision, 57.
Syllabi prefixed to, 58.
Advisory, as precedents, 88.
Character of, as affecting value of precedent, 122.
Criticism of opinions, 122.
Defective and illogical reasoning, 122.
Length and character of opinion, 124.
Citation of authorities, 126.

[The figures refer to pages]

OPINION OF COURT—Cont'd.
Anonymous and per curiam opinions, 129.
Dissenting, effect of, 130, 131.

ORIGINAL PRECEDENTS,
Defined, 9.

OVERRULED CASES,
Loss of authority as precedents, 99.
In other states, effect as precedents, 409.
English, effect as precedents, 431.

OVERRULING CASES,
Maxim of stare decisis in general, 182–221.
Change in composition of court no reason for, 189.
Manifest error in decision, 199.
Obsolete cases, 146.
Reasons for and against, in general, 203.
Authority and discretion of court, 204.
Isolated decisions, 206.
Decision by divided court, 207.
Acquiescence in or approval of decision, 207.
Decision contrary to principle, 208.
Decision contrary to weight of authority, 209.
Rights or interests of state involved, 210.
Beneficial and injurious consequences weighed, 211.
Hardship in particular cases, 212.
Reasons for refusing to overrule, 213.
In case of decisions constituting rules of property, 255, 259.
Effect of reversal or overruling, 689–701.
Retrospective effect in general, 689.
The "law of the case," 691.
Saving of vested rights and contracts, 693.
Showing individual rights and injury, 695.
Taxes and exemptions, 698.
Effect on existing judgments, 700.

P

PARENT AND CHILD,
Federal courts follow state decisions on law of, 535.

PARTIES,
Change of, affecting application of "law of the case," 286.

PATENT CASES,
Special rule in federal courts as to following prior decision in, 323.

PATENT LAWS,
Decisions on, by federal courts, binding on state courts, 351.

[The figures refer to pages]

PENAL LAWS,
Of another state, precedents for construction of, 385.
Of state, construction of, by state court, followed by federal courts, 566.

PER CURIAM OPINIONS,
Value of, as precedents, 129.

PERSONAL PROPERTY,
Federal courts follow state decisions as to, 525.

PLEADING,
Decisions on questions of, as "law of the case," 270.
Federal courts conforming to state rules of, 665.
General rule, 665.
State statutes and decisions on pleading, 669.
Not applicable in criminal cases, 678.

PRACTICE,
Decisions on matters of, rule of adherence to, 194.
As rules of property, 246.
As "law of the case," 270.
Federal decisions on questions of, as authority in state courts, 359.
Federal courts conforming to state rules of, 665.
General rule, 665.
Questions of process and jurisdiction, 671.
Right of action and prerequisites to suit, 674.
Judicial authority and discretion, 676.
Criminal cases, 678.

PRECEDENTS,
Judicial, nature and authority of, 1–165.
Meaning of the term, 2.
Basis of doctrine of precedents, 3.
Judicial decisions as law or evidence of law, 6.
Classification of, 9.
Value and importance of, 12.
Comparative jurisprudence of, 14.
Doctrine of, in ancient and modern English law, 24.
Theory of, affecting growth and development of law, 28.
Doctrine of, in equity jurisprudence, 30.
Scope and limitations of, 37.
Opinion and decision distinguished, 38.
Ratio decidendi, 39.
Several questions in same case, 43.
Interpretation of judicial decisions, 49.
Opinions and syllabi, 53.
Distinguishing cases, 60.
Arguing from analogy, 63.
Combining precedents, 63.

[The figures refer to pages]

PRECEDENTS—Cont'd.
Legislative and executive constructions as, 72.
Decisions of special tribunals and quasi judicial bodies as, 72.
Effect on, of division of court, 76.
Considerations affecting the force of, 80.
Nature of question decided and form of proceeding, 82.
Hypothetical, friendly, and test cases, 85.
Advisory opinions, 88.
New and isolated decisions, 90.
Leading cases, 95.
Ancient cases, 95.
Cases involving peculiar facts, 98.
Cases doubted, criticised, or overruled, 99.
Cases approved or acquiesced in, 105.
Argument by counsel, 107.
Degree of consideration by court, 107.
Rank and reputation of court or judge, 112.
Bias of judge, 116.
Decisions of co-ordinate courts, 117.
Decisions of inferior courts, 118.
Opinion of the court, 122.
Citation of authorities, 126.
Anonymous and per curiam opinions, 129.
Dissenting opinions, 130.
Unanimity and dissent, 131.
Judges absent or not participating, 134.
Judges concurring in result only, 135.
Effect of pending appeal or rehearing, 137.
Reports of cases, 138.
Obsolete or locally inapplicable, departure from, 146.
Absence or want of, decision on principle, 152.
Dicta not binding as, 176.
Stare decisis, doctrine of, and application, 182–221.
Reasons for and against overruling, 203.
Conflicting, decision in case of, 220.
On constitutional and statutory construction, 222–236.
Considered as establishing rules of property, 237–260.
As constituting the "law of the case," 262.
Authority of, as between various courts of same state, 294.
As between various federal courts, 311.
Decisions of federal courts as authority in state courts, 336.
Decisions of courts of other states, 380–427.
Value and effect of English decisions as, 428–451.
Decisions of other foreign countries as, 447.
Federal courts following decisions of local state courts, 452.
General rules and principles, 452–495.
Matters of local law and rules of property, 496–537.
Construction of state constitution and laws, 538–593.

[The figures refer to pages]

PRECEDENTS—Cont'd.
Not as to federal questions, 594–610.
Not on questions of commercial or general law, 611–654.
Not in equity and admiralty cases, 655–664.
Pleading, practice, and evidence, 665.
Effect of reversal or overruling, 689.

PREPONDERANCE OF AUTHORITY,
Conforming decisions to, in absence of binding precedent, 416.

PRIVATE INTERNATIONAL LAW,
Decisions of foreign courts as evidence of local law, 447.
State decisions on, not binding on federal courts, 653.

PROBATE LAW,
Decisions in, as rules of property, 243.
English ecclesiastical cases as precedents in, 439.
Federal courts follow state decisions as to, 521.

PUBLIC LANDS,
Federal courts follow state decisions as to, 506, 578.

PUBLIC OFFICERS,
Decisions on title and rights of, as rules of property, 244.

PUBLIC POLICY,
Considerations of, as affecting decision of novel cases, 168.
Of state, federal courts follow state decisions as to, 499.
General, state decisions on, not binding in federal courts, 650.

R

RATIO DECIDENDI,
Meaning of, 39.

REAL PROPERTY LAW,
Decisions on, as rules of property, 237 et seq.
Local decisions on, conclusive elsewhere, 396.
Federal courts follow state decisions on, 504, 579.

REASON, LEGAL,
Deciding cases according to, in absence of precedent, 421.

RECORDING OF INSTRUMENTS,
Decisions on, as rules of property, 239.
Federal courts follow state decisions on, 518.

REDEMPTION,
From mortgages, federal courts follow state decisions as to, 513.

RE-ENACTED STATUTES,
Rule of stare decisis applied to decisions construing, 235.
From another state, local construction of, binding, 388.
From England, local construction followed, 433.

REHEARING,
Pending, effect on value of decision as precedent, 187.

[The figures refer to pages]

REMOVAL OF CAUSES,
To federal court, previous decisions as "law of the case," 289.
Laws authorizing, construction of, by federal courts binding on state courts, 351.

REPEAL,
Of statute, federal courts follow state decisions as to, 554.

REPORTS,
Of cases, as affecting value of precedents, 138.

RES JUDICATA,
Principle of stare decisis distinguished from, 191.
Distinguished from doctrine of "law of the case," 264.

RES NOVA,
Decision of, value as precedent, 91.
Rules for decision of, 152.
Decisions of other states as authorities on, 403.
English cases as guides for decision of, 440.

REVENUE LAWS,
Of state, construction of, by state court, followed by federal courts, 587.
See, also, Tariff Cases.

REVERSAL OF PREVIOUS DECISION,
See Overruling Cases.

RIPARIAN RIGHTS,
Decisions on, as establishing rules of property, 238.
English decisions on, rejected in western America, 444.

ROMAN LAW,
Doctrine of precedents in, 14.

RULES OF PROPERTY,
Defined and described, 237.
Judicial decisions establishing, in general, 237.
Titles to lands, 237.
Execution and recording of conveyances, 239.
Judicial sales, 240.
Condemnation proceedings, 241.
Dedication of lands, 241.
Investments, contracts, and securities, 242.
Law of wills and descent, 243.
Title and rights of public officers, 244.
Statutory construction, 245.
Precedents not settling rules of property, 245.
Requisites of decision to constitute rule of property, 247.
Scope and limitations of rule, 247.
Actual or presumptive reliance on rule, 251.
Judicial adherence to, 255.

[The figures refer to pages]

RULES OF PROPERTY—Cont'd.
When reversible, 259.
Established by decisions of state courts, followed by federal courts, 502.

S

SINGLE DECISIONS,
Value of, as precedents, 90.
As establishing rules of property, 247, 249.
More readily overruled, 206.
Of state court, binding on federal court, 465.

SPECIAL TERM,
Of court, bound by decisions of general term, 308.

STARE DECISIS,
Doctrine of, and applications, 182–221.
General principle of, 182.
Meaning of the rule, 182.
Reasons of rule, 184.
Necessity of decision by court of final jurisdiction, 186.
Retroactive effect of decision, 187.
Limitations on power to overrule decisions, 187.
Circumscribing former decision, 188.
Change in composition or organization of court, 189.
Doctrine of, distinguished from res judicata, 191.
Decisions on matters of practice, 194.
Former decision on same facts or transaction, 195.
Decisions on questions of fact or evidence, 198.
Limitations of rule, 199.
Decision manifestly erroneous, 199.
Precedents obsolete or locally inapplicable, 146.
Reasons for and against overruling former decisions, 203.
Authority and discretion of courts, 204.
Isolated decisions, 206.
Decision by divided court, 207.
Acquiescence or disapproval, 207.
Decision contrary to principle, 208.
Decision contrary to weight of authority, 209.
Rights and interests of state involved, 210.
Beneficial and injurious consequences weighed, 211.
Hardship in particular cases, 212.
Reasons for refusing to overrule, 213.
Application of maxim, extremes to be avoided, 218.
Conflicting decisions, 220.
Applied to constitutional and statutory construction, 222.
Applied to rules of property, 237.
"Law of the case" distinguished from doctrine of, 264.
Rule of, as between various courts of same state, 294.
As between various federal courts, 311.

STARE DECISIS—Cont'd.
Applied to federal decisions in state courts, 336.
Decisions of courts of other states, 380–427.
Decisions of English and other foreign courts, 428–451.
Federal courts following decisions of local state courts, 452.
General rules and principles, 452–495.
Matters of local law and rules of property, 496–537.
Construction of state constitution and laws, 538–593.
Not as to federal questions, 594–610.
Not on questions of commercial or general law, 611–653.
Not in equity and admiralty cases, 655–664.
Pleading, practice, and evidence, 665.
Effect of reversal or overruling of prior decisions, 689.
Retrospective effect in general, 689.
The "law of the case," 691.
Saving of vested rights and contracts, 693.
Showing individual rights and injury, 695.
Taxes and exemption, 698.
Effect on existing judgments, 700.

STATE COURTS,
Authority of precedents as between courts of same state, 294.
Supreme court and inferior courts, 294.
Decisions of commissioners, 297.
Supreme court not bound by decisions of inferior courts, 298.
Supreme court and intermediate appellate courts, 299.
Intermediate and inferior courts, 303.
Chancery courts, 305.
Courts of co-ordinate jurisdiction, 306.
General and special terms, 308.
Decisions of federal courts as authorities in, 336.
Federal questions in general, 336.
Validity and construction of acts of Congress, 347.
Jurisdiction and powers of federal courts, 352.
Interpretation and application of federal decisions, 354.
Questions of general jurisprudence or local law, 359.
Validity and construction of state statutes, 364.
Commercial law, 368.
Decisions of inferior federal courts, 372.
Rule for inferior state courts, 374.
Decisions of, as authorities in other states, 380.
Construction and application of statutes, 380.
Constitutionality of statutes, 386.
Construction of adopted statute, 388.
Questions of local law, 396.
Effect of obiter dicta, 400.
Questions of general law, 400.

[The figures refer to pages]

STATE COURTS—Cont'd.
Decisions of inferior courts, 410.
Conforming decision to general current of authority, 413.
Conflicting decisions of other states, 416.
Federal courts following decisions of, 452.
General rules and principles, 452–495.
Local law and rules of property, 496–537.
Construction of state constitution and laws, 538–593.

STATUTE OF FRAUDS,
English decisions as authorities on, 435.
Federal courts follow state decisions as to, 565.

STATUTE OF LIMITATIONS,
English decisions as authorities on, 435.
Federal courts follow state decisions as to, 583.

STATUTES,
Enactment and repeal of, federal courts follow state decisions as to, 554.
Construction and interpretation of, see Construction of Statutes.
Constitutionality of, see Constitutional Law.
Statute of frauds, see that title.
Statute of limitations, see that title.

STATUTORY CONSTRUCTION,
See Construction of Statutes; Interpretation.

SUNDAY LAWS,
Construction of, by state courts, followed in federal courts, 582.

SUPERIOR COURT,
Duty to follow decisions of court of last resort, 300.

SUPREME COURT OF STATE,
Decisions of, as precedents in lower courts, 294.
Decisions of commissioners, 297.
Not bound by decisions of inferior courts, 298.
Decisions of, binding on intermediate appellate courts, 299.
When bound by decisions of U. S. Supreme Court, 336 et seq.
Decisions from other states as precedents in, 380–427.
Decisions of, when binding on federal courts, 452 et seq.

SUPREME COURT OF UNITED STATES,
Decisions of, binding in other federal courts, 311.
General rule, 311.
What courts are bound, 312.
What questions concluded, 313.
Conflicting authority elsewhere, 313.
Dicta and conflicting decisions, 314.
Decisions of inferior federal courts as precedents in, 316.
Construction of state constitution and statutes by, 318.

[The figures refer to pages]

SUPREME COURT OF UNITED STATES—Cont'd.
Decisions of, when binding on state courts, 336 et seq.
Following decisions of state supreme court, 452 et seq.

SYLLABI,
Study of, in connection with opinions, 53.

T

TARIFF CASES,
Special rule in federal courts as to following prior decisions in, 328.

TAX LAWS,
Of state, construction of, by state courts, followed by federal courts, 587.
Reversal of construction of, effect on existing rights, 698.

TELEGRAPH COMPANIES,
Liability for negligence, state decisions on, not binding in federal courts, 642.

TERRITORIES,
Courts of, following decisions of federal courts, 377.
Construction of state laws extended over, 396, 563.
Decisions of courts of, followed by federal courts, 457.

TEST CASES,
Decisions in, as precedents, 85.
In state courts, decisions in, duty of federal courts to follow, 467.

TITLE TO LANDS,
Decisions on, as establishing rules of property, 237.
Effect on, of overruling prior decisions, 693.

TORTS,
State decisions on general law of, not binding in federal courts, 639.

TRADE-MARKS,
Decisions of federal courts on, binding on state courts, 351.

TRIALS,
Application of "the law of the case" to, 271.

U

UNITED STATES COURTS,
See Federal Courts.

USURY,
Under national bank act, decisions on, by federal courts, binding on state courts, 351.
Federal courts follow state decisions on general law of, 536.

[The figures refer to pages]

V

VESTED RIGHTS,
Decisions of state courts affecting, when followed by federal courts, 484, 548, 606.
Effect on, of reversing prior decisions, 693.

W

WASTE,
English decisions on, considered inapplicable in America, 445.
WEIGHT OF AUTHORITY,
Decision of new case in accordance with, 161.
Decision contrary to, may be overruled, 209.
Conforming decision to, 413.
WILLS,
Decisions on validity and construction of, as rules of property, 243.
Construction of, by state courts, followed by federal courts, 521, 580.
WITNESSES,
Competency of, how determined in federal courts, 682.
WRIT OF ERROR,
See Error, Writ of.
WRITTEN LAWS,
Construction of, application of rule of stare decisis to, 222.

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3. Same—Continued.
4. The District Court—Criminal Jurisdiction—Miscellaneous Jurisdiction.
5. The District Court—Bankruptcy.

6-8. Same—Continued.

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7. Materialty in Pleading.
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9. Certainty in Pleading.
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5. Equity.
6. The Written Law.
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5. Delegation by Agent—Subagents.
6. Termination of the Relation.
7. Construction of Authority.

Part 2.—RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND THIRD PERSON.

8. Liability of Principal to Third Person—Contract.
9. Same (continued).
10. Admissions by Agent—Notice to Agent.
11. Liability of Principal to Third Person—Torts and Crimes.
12. Liability of Third Person to Principal.

Part 3.—RIGHTS AND LIABILITIES BETWEEN AGENT AND THIRD PERSON.

13. Liability of Agent to Third Person (including parties to contracts).
14. Liability of Third Person to Agent.

Part 4.—RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

15. Duties of Agent to Principal.
16. Duties of Principal to Agent.

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3. Rights in Property as affected by Coverture.
4. Contracts, Conveyances, etc., and Quasi-Contractual Obligations.
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6. Antenuptial and Postnuptial Settlements.
7. Separation and Divorce.

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8. Legitimacy, Illegitimacy, and Adoption.
9. Duties and Liabilities of Parents.
10. Rights of Parents and of Children.

Part 3.—GUARDIAN AND WARD.

11. Guardians Defined—Selection and Appointment.
12. Rights, Duties, and Liabilities of Guardians.
13. Termination of Guardianship—Enforcing Guardian's Liability.

Part 4.—INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

14. Infants.
15. Persons Non Compotes Mentis and Aliens.

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4. Effect of the Contract in Passing the Property—Sale of Goods not Specific.
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5. Diplomatic Relations.
6. Consular and Other Relations.
7. Treaties and Other International Agreements.
8. Amicable Means of Settlement of International Differences.
9. Non-Amicable Measures of Redress Short of War.
10. Nature and Commencement.
11. Area and General Effect of Belligerent Operations.
12. Rights and Obligations During War.
13. Persons During War.
14. Property on Land.
15. Property on Water.
16. Maritime Capture.
17. Rules of War.
18. Military Occupation and Government.
19. Prisoners, Disabled and Shipwrecked.
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